No. 82-419

Office - Supreme Court, U.S.
FILED
SEP 9 1982
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

OWENS-ILLINOIS, INC.,
Petitioner,

VS.

FLOYD WILLIAMS, JR., et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Ninth Circuit

MORGENSTEIN, LADD & JUBELIRER
MARVIN D. MORGENSTEIN
COUNSEL OF RECORD
JEFFREY R. WILLIAMS
255 California Street, Suite 800
San Francisco, California 94111
(415) 421-9320
R. JEFFREY BIXLER
OWENS-ILLINOIS, INC.
One SeaGate Plaza
Toledo, Ohio 43666
(419) 247-5000
PAUL, HASTINGS, JANOFSKY & WALKER
LLOYD SUTTER
230 Peachtree Street, N.W.
Suite 1100
Atlanta, Georgia 30303
(404) 588-9900

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-6500

QUESTIONS PRESENTED

1. May a Court of Appeals set aside findings of fact made by the District Court in an employment discrimination case where those findings (1) were not found to be clearly erroneous under Rule 52(a) of the Federal Rules of Civil Procedure, and (2) were not the result of legal errors made by the District Court?

2. Did the Court of Appeals err in retroactively applying the 300-day limitation period to this employment discrimination class action where the District Court had applied the 180-day limitation period followed in the Ninth Circuit at the time of the District Court's decision?

---

*The subsidiaries of petitioner Owens-Illinois, Inc. (other than wholly owned subsidiaries) are: Andover Controls Corporation; Health Group, Inc.; Insulation Research Corp.; National Petro Chemicals Corp.; Duradrum Corporation; OI/Schott Process Systems, Inc.; Sunmaster Corporation.

**In addition to Floyd Williams, Jr., the following named plaintiffs and/or intervenors were parties to the proceedings in the Court of Appeals: Alice Brice, Robert Harold, Aunita Jones, and Charlotte Harris.

TABLE OF CONTENTS

	Page
Questions presented	i
Opinions below	1
Jurisdiction	2
Statutes	2
Statement of the case	2
A. Introduction	2
B. Proceedings in District Court	4
C. Opinion of the Court of Appeals	9
Reasons for granting the writ	9
I	
The decision of the Court of Appeals conflicts with this Court's opinion in *Pullman-Standard v. Swint*	9
(a) The District Court's relevant labor market determination did not influence any findings of fact	11
(b) The District Court's ruling on the collective bargaining agreement did not influence any findings of fact	14
II	
The Court of Appeals decision on the statute of limitations violates the standards for retroactive application established by this Court in *Chevron Oil Co. v. Huson*	15
(a) The District Court followed the 180-day rule in effect in the Ninth Circuit at the time of the District Court's decision	16
(b) The 300-day rule of *Reed v. Lockheed Aircraft Corp.* should not be applied retroactively to the present case	18
Conclusion	20

TABLE OF AUTHORITIES

Cases

Page

Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978) 7

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) 4, 15, 16, 18, 19, 20

Dothard v. Rawlinson, 433 U.S. 321 (1977) 11, 12

Hazelwood School District v. United States, 433 U.S. 299 (1977) 7, 8, 11

Kelley v. Southern Pacific Co., 419 U.S. 318 (1974) 13

Kirk v. Rockwell International Corp., 578 F.2d 814 (9th Cir. 1978), *cert. denied* 439 U.S. 1004 (1978) 19

Lynn v. Western Gillette, Inc., 564 F.2d 1282 (9th Cir. 1977) 19

Northern Pipeline Construction Co. v. Marathon Pipe Line Co., ... U.S. ....., 50 U.S.L.W. 4892 (June 28, 1982) 20

Owens v. Commercial Union Fire Ins. Co., 211 F.2d 488 (4th Cir. 1954) 13

Pullman-Standard v. Swint, 456 U.S. ....., 50 U.S.L.W. 4425 (April 27, 1982) ..... passim

Reed v. Lockheed Aircraft Corp., 613 F.2d 757 (9th Cir. 1980) 17, 18, 19

Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352 (1971) 18

Rodriguez v. Southern Pacific Transportation Co., 587 F.2d 980 (9th Cir. 1978) 17, 19

Teamsters v. United States, 431 U.S. 324 (1977) 7

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) 7

Wiltshire v. Standard Oil Co., 652 F.2d 837 (9th Cir. 1981) 19

Table of Authorities

Statutes

	Page
28 U.S.C. § 1254(1)	2
42 U.S.C.:	
§ 1981 (Civil Rights Act of 1866)	2
§ 2000e, *et seq.* (Title VII of the Civil Rights Act of 1964)	2
§ 2000e-2(h)	10, 14
§ 2000e-5(e)	2, 16
§ 2000e-5(f)(3)	2

Rules

Federal Rules of Civil Procedure:	
Rule 23(b)(2)	4
Rule 52	9, 10, 11, 13, 15
Rule 52(a)	i, 2, 3, 9, 10

No.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1982

OWENS-ILLINOIS, INC.,
Petitioner,

vs.

FLOYD WILLIAMS, JR., et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Ninth Circuit

Owens-Illinois, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in the case of *Floyd Williams, Jr., et al. v. Owens-Illinois, Inc.*, entered on January 11, 1982, and amended on June 11, 1982.

OPINIONS BELOW

The opinion of the District Court is reported at 469 F. Supp. 70 (N.D. Cal. 1979) and is reprinted as Appendix A. The opinion of the Court of Appeals is reported at 665 F.2d 918 and is reprinted as Appendix B. The order amending the Court of Appeals' opinion and denying rehearing is reported at 28 FEP 1820 and is reprinted as Appendix C.

JURISDICTION

The Court of Appeals entered judgment on January 11, 1982. On June 11, 1982, the Court denied a petition for rehearing, but amended its opinion. This Court has jurisdiction to review the judgment below pursuant to 28 U.S.C. § 1254(1). The District Court had jurisdiction of this action under 42 U.S.C. § 2000e-5(f)(3).

STATUTES

The following relevant statutory provisions are reprinted at Appendix D:

1. Rule 52(a), Federal Rules of Civil Procedure;

2. Section 706(e) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e).

STATEMENT OF THE CASE

A. INTRODUCTION

Respondents are three of the plaintiff-intervenors who brought this class action on behalf of themselves and other black and female employees or former employees at the Oakland, California plant of the petitioner, Owens-Illinois, Inc. ("the Company"). The suit alleged unlawful employment discrimination on the basis of race and sex under the Civil Rights Acts of 1866 and 1964, 42 U.S.C. § 1981 and 42 U.S.C. § 2000e, *et seq.*, respectfully. After an eight-week trial, the District Court entered extensive findings of fact with respect to both the individual claims[1] of discrimination and the claims of discrimination against the separate classes of black and female employees. (Appen-

---

[1]Judgments on the individual claims were not appealed by either party and are not pertinent to this petition.

dix ("App.") A at 2-11, 12-26, 27-70.) The District Court found no discrimination against the black or female classes except in the promotion or assignment of females to certain supervisory and managerial jobs. (App. A at 11-12, 26.) The respondents, on behalf of both classes appealed the judgments against the black and female classes.

The Court of Appeals affirmed in part, reversed in part and remanded. In doing so, the Court of Appeals completely ignored the District Court's extensive findings of fact and failed to apply to them the "clearly erroneous" standard of review, as required by Rule 52(a) of the Federal Rules of Civil Procedure and this Court's recent decision in *Pullman-Standard v. Swint*, 456 U.S. ....., 50 U.S.L.W. 4425 (April 27, 1982). The only clear reference to the findings of fact came in an amendment to the opinion which the Court issued in response to the Company's petition for rehearing. The Court simply indicated, without analysis or explanation, that the District Court must "redetermine" or "reconsider" all of its findings in light of certain errors identified in the Court of Appeals' original opinion. (App. C at 2-4.) Petitioner contends that these legal errors manifestly do not affect the validity of any factual finding and, therefore, the Court of Appeals' complete failure to address the findings directly conflicts with this Court's decision in *Pullman-Standard*, and completely undermines the mandate of Rule 52(a) that findings of fact shall not be set aside unless clearly erroneous.

In addition, the Court of Appeals extended the relevant limitations period by 120 days, holding that the District Court should have applied a limitations period of 300 days prior to the filing of the initial charge of discrimination, instead of the 180-day period applied by the District

Court. (App. B at 51-54, n. 2.) This retroactive application of the 300-day rule, which was adopted by the Ninth Circuit only after the decision of the District Court below, is in direct conflict with the standard for retroactive application of judicial decisions established by this Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).

For the foregoing reasons, as more fully explained herein, a writ of certiorari should be issued to review the Court of Appeals' judgment.

B. PROCEEDINGS IN DISTRICT COURT

The complaint in this action alleged employment discrimination on the basis of race and sex in the areas of initial job assignments, promotions, terminations, wages, and treatment on the job. The District Court certified two separate employee classes under FRCP 23(b)(2): (1) all blacks employed at the Oakland plant after March 7, 1971; and (2) all women employed at the plant after March 23, 1974. The class included both hourly employees, whose terms and conditions of employment were controlled by eight separate and distinct collective bargaining agreements, and salaried employees, who were not covered by labor agreements. Separate issues were raised relating to the filling of job vacancies within the hourly workforce, promotions to salaried positions from hourly positions, and filling of job vacancies within the salaried workforce. The classes did not include applicants for employment.

After a lengthy trial in which some 80 witnesses testified and hundreds of documentary exhibits were introduced into evidence, the District Court entered separate findings of fact and conclusions of law as to each class. With respect to the class of black employees, the District Court

entered twenty specific findings of fact addressing the issues of job assignments, promotions, pay, and terminations, and concluded that the Company did not engage in any discrimination against black employees. The District Court specifically found that any differences in the treatment of black and white employees were based upon legitimate, non-discriminatory factors, such as qualifications, seniority, and available job vacancies. (App. A at 4, 6, 7.)

The District Court made some thirty-three separate findings of fact with respect to the class of female employees, largely paralleling the findings relating to the class of black employees. (App. A at 12-26.) The District Court acknowledged that in some areas of the plant few women were employed, but it found that this was due to the low rate of turnover, the lack of interested applicants, and the lack of qualifications. (App. A at 16, 18, 20-21.) In general, the District Court found that with the exception of supervisory and managerial jobs, jobs were awarded to females in a non-discriminatory manner, based upon qualifications, seniority, and applications.

The District Court did find that the Company unduly limited the access of females to supervisory and management jobs, and that it had a pattern or practice of promoting males to these positions instead of qualified females. The Court found that although there were qualified females available for these positions, the candidates were selected by male supervisors and managers who had never chosen a female for promotion into one of these jobs. (App. A at 23-26.)

Based upon the foregoing findings, the District Court entered conclusions of law holding that the class of black

employees had not been discriminated against and that the female class had been discriminated against only in promotion and assignment to supervisory and management positions. (App. A at 11-12, 26.) The respondents, on behalf of both classes, appealed these and certain other adverse determinations.

C. OPINION OF THE COURT OF APPEALS

The Court of Appeals reversed and remanded the judgments against both classes. Although the Court of Appeals separated the two classes in its analysis of the District Court opinion, it did not separately discuss the various issues of discrimination as the District Court had done in its findings of fact. And, the Court did not even mention the findings until it amended its original opinion in response to the Company's petition for rehearing.

With respect to the claims of race discrimination, the Court of Appeals first concluded that plaintiffs had presented sufficient evidence to establish a prima facie case of discrimination if the relevant labor market was either the one urged by plaintiffs or one of greater minority representation. The Court referred to the two job assignment aspects of plaintiffs' statistical study: that although blacks comprised 27% of the new hires, most of the blacks hired were service workers, and that only 11% of the craftsmen hired were black. (App. B at 17.)

The Court of Appeals then indicated that the Company failed to rebut the statistical case presented by the plaintiffs, finding that the Company's alternative studies did not negate the plaintiffs' evidence. (App. B at 17.) However, the Court of Appeals never mentioned the Company's non-statistical evidence or the District Court's finding of

fact that "[i]n the initial assignment of new hires, Owens-Illinois did not discriminate against Black employees. The evidence established that the assignment of new employees was based upon job openings and qualifications of the employee without regard to the race of the employee." (App. A at 4.) This finding of an absence of discrimination directly rebutted any prima facie case of discrimination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978); *Hazelwood School District v. United States*, 433 U.S. 299 (1977); *Teamsters v. United States*, 431 U.S. 324 (1977).

The Court of Appeals next referred to what it characterized as the Company's primary defense: that many of the *wage* and *promotion* practices were mandated by collective bargaining agreements. (App. B at 18.) The trial court had ruled at a pre-trial conference that "any personnel activity, practice or procedure" compelled by a collective bargaining agreement would be deemed non-discriminatory and that the court would not alter or modify any provision of the agreements. This ruling was based upon the failure of plaintiffs to join as defendants the union parties to the eight labor agreements. The Court of Appeals held this ruling to be erroneous as a matter of law, indicating that an agreement permitting an employer to discriminate does not bar claims of unlawful conduct. (App. B at 18.)

The Court of Appeals then returned to the relevant labor market determination referred to by the District Court, and concluded that it was error to select Alameda County as the labor market from which it would be anticipated that the Oakland plant would hire employees. (App. B at 21.) Accordingly, the claims of the black class were

remanded to determine the appropriate definition of the relevant labor market.

The Court of Appeals never stated to what issue (*e.g.*, job assignments, promotions, or terminations) the labor market determination pertained. Since it cited this Court's decision in *Hazelwood School District v. United States*, 433 U.S. 299 (1977) (App. B at 24), the Court presumably considered the labor market pertinent to claims of hiring discrimination. Yet, this was not a hiring discrimination case. The class certifications both were limited to current or former *employees*. They did *not* include *applicants* for hire or others who desired employment with the Company, and the issues submitted to the jury did not include hiring discrimination. The issues in the case were limited to job assignments, promotions, pay, and terminations, none of which are influenced by the definition of the relevant labor market. In fact, throughout its decision, the Court of Appeals never describes the discrimination issues with any precision, choosing instead to lump together as identical issues questions concerning placements, promotions, pay and terminations, both as to employees covered by labor agreements and those not covered.

The Court of Appeals' approach to the sex discrimination issue paralleled its decision on the race claims. The Court reviewed plaintiffs' statistical evidence, which was addressed almost exclusively to the initial job assignment of females within the plant and to claimed disparities in wages between men and women. Ignoring again the District Court's factual findings on the job assignment issue, as well as findings on all other issues, the Court of Appeals reversed and remanded the entire sex discrimination case, directing redetermination of the relevant labor

market. (App. B at 36-37.) And, again, the Court of Appeals did not state what issues were related to the labor market determination, or on what issue a prima facie case could be established with a proper market determination. The Court never examined the District Court's extensive findings of fact to determine whether they would have rebutted any conceivable prima facie case.

In sum, the Court of Appeals' original opinion completely ignored the District Court's findings of fact on all issues. The Company sought rehearing, specifically urging the application of Rule 52(a) to the District Court's findings and, in a letter brief, calling attention to this Court's intervening decision in *Pullman-Standard v. Swint*. The Court of Appeals then amended its opinion, seizing upon the District Court's possible legal errors as justification for requiring redetermination of all findings of fact. The Court of Appeals never analyzed whether such errors could have actually influenced the findings of fact, choosing instead to maintain its blanket remand of the class judgments.

REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S OPINION IN PULLMAN-STANDARD v. SWINT.

In its original opinion, the Court of Appeals did not mention Rule 52, did not mention the "clearly erroneous" standard, and did not mention a single District Court finding of fact. The amendment does not bring the opinion into compliance with *Pullman-Standard v. Swint* and Rule 52 merely because the Court then suggests that its failure to

review the findings was occasioned by two District Court errors of law. The findings are totally unrelated to the legal determinations set aside by the Court of Appeals. To allow these errors to form the basis for a remand undermines the holding in *Pullman-Standard v. Swint* that findings of fact in employment discrimination actions must be accepted by an appellate court unless found to be clearly erroneous.

In *Pullman-Standard v. Swint*, the trial court found that a plant seniority system had been adopted and maintained for purposes wholly independent of any discriminatory intent, and thus was a "bona fide" seniority system under Section 703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h). The Court of Appeals for the Fifth Circuit reversed the district court's judgment based upon its disagreement with the lower court's determination as to the motivation of the parties who negotiated and adopted the seniority system, but the court of appeals did not expressly hold those findings to be clearly erroneous under Rule 52(a). This Court held that it was error for the court of appeals to reverse the lower court without determining that the findings of fact were clearly erroneous.

In the *Pullman-Standard* opinion, this Court noted that, while the court of appeals had correctly stated the controlling standard of Rule 52, it had done so only at the very end of its opinion, and "had not expressly referred to or applied Rule 52 in the course of disagreeing with the District Court's resolution of the factual issues . . . ." 50 U.S.L.W. at 4430. Rather, the court of appeals made an independent determination of the motivation of the parties in adopting the seniority system, which it characterized as

the "ultimate fact" in that case. In holding this approach to be error, this Court defined the mandate of Rule 52 as follows:

> "Rule 52 broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a Court of Appeals to accept a district court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with 'ultimate' and those that deal with 'subsidiary' facts."
> 50 U.S.L.W. at 4429.

Under *Pullman-Standard*, the Court of Appeals here could not ignore the trial court's extensive findings of fact. The Court of Appeals' amendment purported to ground the remand upon possible legal errors, without demonstrating how the errors identified could have conceivably impacted those findings. On closer analysis, it becomes clear that the Court of Appeals simply ignored the findings of fact, the requirements of Rule 52, and *Pullman-Standard v. Swint*.

(a) The District Court's Relevant Labor Market Determination Did Not Influence Any Findings of Fact.

The Court of Appeals never explained the significance of the relevant labor market determination in the context of this case. The Court cited *Hazelwood School District v. United States*, 433 U.S. 299 (1977), and *Dothard v. Rawlinson*, 433 U.S. 321 (1977), in the course of discussing the labor market determination, but both these cases involved only claims of *hiring* discrimination. In *Hazelwood*, the government asserted that the defendant school district

was engaged in a "pattern or practice" of discrimination in hiring school teachers. A comparison of the percentage of minority teachers hired to the percentage available in the relevant labor market was an essential element of establishing a prima facie case of *hiring* discrimination. And *Dothard* involved a class of female *applicants* who claimed discrimination in the application of a uniform hiring requirement. Neither case indicated that external labor market analyses are appropriate for job assignment, promotion, pay and termination issues.

The trial court's findings of fact with respect to both the black and female classes do not purport to be based in any respect upon relevant labor market calculations. The findings address the existence of differences in treatment between black and white employees and between male and female employees. In some instances, no differences in treatment were found, such as in the wages paid to black and white salaried employees. In other situations, such as the assignment of females to hourly jobs, the findings acknowledge the absence or under-representation of women in certain positions.

The District Court then dealt with the Company's evidence that any differences in treatment were based on legitimate, non-discriminatory factors, finding that this evidence proved an absence of discrimination in all areas except one. Whether the relevant labor market is Alameda County or the City of Oakland will simply not change the fact that job assignments and promotions were based upon available job vacancies, qualifications and seniority, and not race or sex. Nor will the correct market analysis somehow change the findings that black salaried employees were paid amounts equal to white employees

for similar work and that no black employee was paid less than required by a bona fide job evaluation system.

The Court of Appeals' labor market discussion is even more perplexing when applied to the claims of sex discrimination. The District Court did not even purport to analyze the claims of the female class against any labor market. The reason, of course, was clear. *This case did not involve hiring discrimination issues.* In any event, a proper labor market determination will not change the existence of the legitimate, non-discriminatory factors for the absence of females in certain jobs. The proven lack of interest of females in certain undesirable jobs in the plant, the low rate of turnover in certain jobs, and the use of seniority and qualifications in awarding the jobs, are not dependent in any way on the definition of the labor market from which the Company could be expected to draw its employees.

Petitioner does not dispute the general rule that findings of fact should be redetermined where errors of law have manifestly influenced and controlled the findings. *Pullman-Standard v. Swint, supra; Kelley v. Southern Pacific Co.*, 419 U.S. 318 (1974); *Owens v. Commercial Union Fire Ins. Co.*, 211 F.2d 488 (4th Cir. 1954). But, as we have shown, the relevant labor market error purportedly made by the District Court did not influence any findings of fact. To permit the findings to be ignored without any analysis of the actual impact of the legal error completely undermines this Court's opinion in *Pullman-Standard v. Swint* and the standard of review under Rule 52.

(b) The District Court's Ruling on the Collective Bargaining Agreement Did Not Influence Any Findings of Fact.

In its original opinion, the Court of Appeals concluded that the District Court erred in its pretrial ruling that any personnel activity, practice or procedure compelled by a collective bargaining agreement would be deemed non-discriminatory. The obvious purpose of this ruling by the District Court was to avoid reformation of any of the eight labor agreements without the presence in the litigation of the labor union parties to these agreements. In its amendment to the opinion, the Court of Appeals acknowledged that § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), allows certain defenses for actions taken pursuant to a bona fide seniority system, but held that the District Court's ruling went beyond the scope of these defenses. The Court of Appeals, again without identifying any specific findings of fact, directed the District Court to redetermine any finding based upon this pre-trial ruling.

The District Court manifestly did not base any finding upon its labor agreement ruling. Initially, the labor agreements covered only the hourly workforce and, therefore, no finding relating to salaried positions could possibly have been influenced by the collective bargaining issues. And, as the Court of Appeals pointed out, the labor agreement issue related to wages and promotions and not to job assignments or terminations. Moreover, the District Court made a specific finding, based upon evidence presented at trial, that the labor agreements were not discriminatory. The Court found that the agreements did not adversely impact or affect members of the black class, and did not have the effect of denying any job, promotion, pay in-

crease, or any other term or condition of employment to any person because of race. Similar findings were made with regard to the sex discrimination issues. At no point in its findings did the District Court defer to its pretrial ruling on the labor agreements.

The effect of the Court of Appeals' remand is to establish a standard of review allowing the disregard of findings of fact whenever a trial court makes a legal error, irrespective of whether the error actually influences any finding. Such a standard is particularly burdensome in a case such as this where the findings are based upon consideration of some eight weeks of testimony and hundreds of documentary exhibits. The indiscriminate remand of all the District Court findings nullifies the purpose of Rule 52 and the import of *Pullman-Standard v. Swint*. The Court should grant certiorari to ensure the viability of the "clearly erroneous" standard by precisely defining the nature of the legal errors that may permit the disregard of factual findings. This case presents an excellent opportunity to address this issue.

II

THE COURT OF APPEALS DECISION ON THE STATUTE OF LIMITATIONS VIOLATES THE STANDARDS FOR RETROACTIVE APPLICATION ESTABLISHED BY THIS COURT IN CHEVRON OIL CO. v. HUSON.

The Court of Appeals held that the District Court erred in applying the 180-day statute of limitations in determining the class period. It held that the 300-day limit should have been applied. (App. B at 11, 51 n. 2.) However, the 300-

day rule was not adopted by the Ninth Circuit until after the decision of the District Court in this case. The decision of the District Court, at the time it was filed, followed the rule in the Ninth Circuit that the limitation period should be computed by subtracting 180 days from the date of the initial complaint filed with the EEOC. Under the decision of this Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the subsequently-adopted 300-day rule of this Circuit should not have been applied retroactively, and the Court of Appeals' decision in this regard should be reversed.

(a) The District Court Followed the 180-Day Rule in Effect in the Ninth Circuit at the Time of the District Court's Decision.

The District Court opinion in this matter was filed on January 8, 1979. The District Court held that the statute of limitations used in determining the actionable class period should be computed by subtracting 180 days from the filing of the initial EEOC complaint for the respective black and female classes. In this holding, the District Court followed the clear language of § 706(e) of Title VII (42 U.S.C. § 2000e-5(e)), which states in relevant part:

> "A charge under this Section shall be filed within 180 days after the alleged unlawful employment practice occurred . . . except that in the case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice . . . such charge shall be filed by or on behalf of the person aggrieved within 300 days after the alleged unlawful employment practice occurred. . . ."

In *Rodriguez v. Southern Pacific Transportation Co.*, 587 F.2d 980 (9th Cir. 1978), the Ninth Circuit affirmed the District Court's application of the 180-day limitations period to a Title VII action. The Ninth Circuit held:

> "[I]n *Olson v. Rembrandt Printing Co.*, 511 F.2d 1228, 1231-33 (8th Cir. 1975), the only circuit court to address the issue had carefully explored the legislative history and policy of the statutes and had adopted the position urged in this case by Southern Pacific. *Accord, Wiltshire v. Standard Oil Co. of California*, 447 F.Supp. 756 (N.D. Cal. 1978). The district court concluded that the Eighth Circuit had stated the better view in *Olson* and that there was no reason to set aside judgment of dismissal. Because the district court's interpretation of the statutory jurisdictional requirements had substantial support at the time of the denial of the motion, we cannot say that it abused its discretion in declining to set aside its judgment of dismissal." 587 F.2d at 981.

Thus, not only did the District Court's application of the 180-day rule have "substantial support at the time of [its decision]", but it followed the clear authority of the Ninth Circuit in *Rodriguez v. Southern Pacific Transportation Co.*

In *Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757, 759 (9th Cir. 1980), decided over a year after the District Court's opinion in this action, the Ninth Circuit adopted the 300-day rule. As will be demonstrated below, this rule should not be applied retroactively to this case.

(b) The 300-Day Rule of Reed v. Lockheed Aircraft Corp. Should Not Be Applied Retroactively to the Present Case.

In *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107 (1971), this Court set forth the criteria to be considered in determining the retroactive effect of a judicial decision:

> 1. The decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed.
>
> 2. The court must consider the prior history of the rule in question, its purpose and effect, and whether retroactive application will further or retard its operation.
>
> 3. The court must weigh the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of non-retroactivity."

In *Chevron*, the Supreme Court held that its decision in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1971), holding that state statutes of limitations apply to federal actions under the Outer Continental Shelf Lands Act, should not be applied retroactively. This Court noted that its decision in *Rodrigue* effectively overruled a long line of Court of Appeals decisions, which for over a year had represented the law of the case in the district court. For these reasons, the Supreme Court in *Chevron* held that its *Rodrigue* decision should not be applied retroactively.

When the *Chevron* factors are considered in the present case, it is clear that the 300-day rule of *Reed v. Lockheed*

Aircraft Corp. should not be applied retroactively to this case. The first criterion of *Chevron* is met in this case. At the time of the District Court opinion, the 180-day rule was well established in the Ninth Circuit. *Rodriguez v. Southern Pacific Transportation Co.*, 587 F.2d 980 (9th Cir. 1978); *see also Kirk v. Rockwell International Corp.*, 578 F.2d 814 (9th Cir. 1978), *cert. denied* 439 U.S. 1004 (1978); *Lynn v. Western Gillette, Inc.*, 564 F.2d 1282 (9th Cir. 1977). The 300-day rule had not been "clearly foreshadowed," as required by *Chevron*, but in fact was a complete reversal of previous Ninth Circuit law.

Second, the purpose of the 300-day rule will not be furthered by applying it retroactively to a case such as this. The rule, being one of limitations, is designed "to provide a predictable time period that strikes a fair balance between a claimant's right to a reasonable time within which to commence litigation, and a defendant's right not to be required to defend stale claims." *Wilshire v. Standard Oil Co.*, 652 F.2d 837, 841 (9th Cir. 1981). Not only will the purpose of this rule not be furthered by retroactive application, but its purpose would be thwarted if Owens-Illinois were now required to defend against a new set of charges occurring between eight and ten years ago. (The classes of black and female employees would be allowed to go back to November 7, 1970, and November 23, 1973, respectively, under the decision of the Court of Appeals.)

Finally, the equities of this case require that this decision not be applied retroactively. The inequity to be done by completely undoing an eight week trial, involving dozens of witnesses, hundreds of exhibits, and thousands of

pages of transcript, would far outweigh the benefits of retroactive application, which would simply add to the classes of employees certified below persons employed at the Owens-Illinois Oakland plant for an additional 120 days, none of whom ever even filed an EEOC charge complaining of discrimination.

Thus, the decision of the Court of Appeals to apply the 300-day rule retroactively conflicts with this Court's decision in *Chevron Oil v. Huson, supra,* which was most recently approved in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, ... U.S. ...., 50 U.S.L.W. 4892 (June 28, 1982). A writ of certiorari should be issued to bring the decision of the Court of Appeals into conformity with these decisions.

CONCLUSION

For the foregoing reasons, Owens-Illinois respectfully submits that a writ of certiorari should issue to review the decision of the Court of Appeals.

Dated: September 9, 1982

Respectfully submitted,

MORGENSTEIN, LADD & JUBELIRER
MARVIN D. MORGENSTEIN
COUNSEL OF RECORD
JEFFREY R. WILLIAMS

R. JEFFREY BIXLER

PAUL, HASTINGS, JANOFSKY & WALKER
LLOYD SUTTER
Attorneys for Petitioner
Owens-Illinois, Inc.

82-419

No.

Office - Supreme Court, U.S.
FILED
SEP 9 1982
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

OWENS-ILLINOIS, INC.,
Petitioner,

VS.

FLOYD WILLIAMS, JR., et al.,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Ninth Circuit

MORGENSTEIN, LADD & JUBELIRER
MARVIN D. MORGENSTEIN
COUNSEL OF RECORD
JEFFREY R. WILLIAMS
255 California Street, Suite 800
San Francisco, California 94111
(415) 421-9320
R. JEFFREY BIXLER
OWENS-ILLINOIS, INC.
One SeaGate Plaza
Toledo, Ohio 43666
(419) 247-5000
PAUL, HASTINGS, JANOFSKY & WALKER
LLOYD SUTTER
230 Peachtree Street, N.W.
Suite 1100
Atlanta, Georgia 30303
(404) 588-9900

BOWNE OF SAN FRANCISCO, INC. • 180 NINTH ST. • S.F., CA 94103 • (415) 864-6500

APPENDIX A

FLOYD WILLIAMS, et al., Plaintiffs,

v.

OWENS-ILLINOIS, INC., Defendant,

No. C-75-1197

United States District Court

N.D. California

January 8, 1979, as amended May 17, 1979

Judgment, March 15, 1979, as amended May 17, 1979.

FINDINGS OF FACT AND

CONCLUSIONS OF LAW

SCHNACKE, District Judge.

The Findings of Fact and Conclusions of Law herein are based upon the findings of the Court and, in those cases of unanimous agreement by the Jury, upon the Jury's verdict. As to matters not unanimously agreed to by the Jury, the Court has found the facts to be in accordance with the view of a majority of the jurors.

On or before January 19, 1979, the parties shall submit proposed forms of judgment, suggestions of the relief appropriate to the findings of fact relating to the class of female employees, memoranda relating to the back pay due plaintiff Alice Brice, and any other matters properly to be brought to the attention of the Court. All of such matters will be heard at 9:30 a.m., on Friday, February 2, 1979.

THE CLASS OF BLACK EMPLOYEES

1. Defendant's Oakland Plant is located in Oakland, California, on the border of Alameda, California. It is within commuting distance of the California cities of Oakland, Hayward, Alameda, San Leandro, Fremont, Richmond, San Lorenzo, Union City and Berkeley. During the period January, 1971 through July 31, 1978 the following percentage of its employees

were hired from those cities: Oakland--46.1%; Hayward--12.4%; Alameda--9.7%; San Leandro--8.6%; Fremont--4.0%; Richmond--3.13%; San Lorenzo--3.1%; Union City--2.4%; Berkeley--1.8%; other cities--8.6%.

2. Of the persons hired in the period from March 7, 1971, through July 31, 1978, and still employed on July 31, 1978, 35% were Black, 41% were White, and 23% were non-Black minority; information on the remaining 1% was not available.

3. The work force statistics by race of all employees at the Oakland Plant for the following years was as follows:

1971:	Minority	30.5%
	Black	14.8%
	Caucasian	69.5%
March 31, 1973:	Minority	31%
	Black	20%

	Caucasian	69%
August 31, 1974	Minority	38.5%
	Black	19%
	Caucasian	61.5%
March 31, 1975	Minority	39%
	Black	19%
	Caucasian	61%
March 31, 1976	Minority	40%
	Black	20%
	Caucasian	60%
March 31, 1978	Minority	45%
	Black	23%
	Caucasian	55%

4. In the initial assignment of new hires, Owens-Illinois did not discriminate against Black employees. The evidence established that assignment of new employees was based upon job openings and qualifications of the employee without regard to the race of the employee.

5. With respect to all employees who were paid an hourly rate, which employees composed 90% of the work force of the Oakland plant, Black and non-Black employees were paid the amounts required to be paid to them pursuant to the collective bargaining agreements applicable to those jobs, and no Black employee was paid either less than the amount required to be paid pursuant to a collective bargaining agreement or less than a non-Black employee in a similar job.

6. With respect to salaried employees, Black employees were paid an amount equal to non-Black employees for similar work, and no Black employee was paid less than the amount established by a bona fide job evaluation system for the job performed.

7. The percentage of Black employees hired by the Oakland plant commencing March

7, 1971 when compared with the percentage of Black persons in the civilian work force for the cities from which it would be anticipated that employees for the Oakland plant would be hired, demonstrates that the Black percentage of persons hired was equal to or greater than the number of Black persons in the applicable civilian work force, so that no finding can be made that Owens-Illinois discriminated against Black persons in hiring from a comparison of the civilian work force statistics with the Oakland plant statistics.

8. Black employees were not placed in jobs within departments, or in special departments, because of their race. The placing of employees was based upon job vacancies in the departments and the qualifications of the employees seeking those vacancies, without regard to race.

9. When an employee was employed in a job covered by a collective bargaining agreement, the promotion of that employee in hourly jobs was controlled by the system provided in the employee's collective bargaining agreement, and Owens-Illinois followed the procedure for promotion established by the collective bargaining agreements.

10. Promotion of employees, from hourly jobs to salaried jobs, and promotion of employees in the salaried jobs, was not made with regard to the employee's race, nor were Black employees as a class denied promotions because of their race.

11. The variance and regression analysis introduced into evidence by plaintiffs did not establish, or support a claim that Owens-Illinois discriminated against its employees in their pay on the basis of the race of the employee, or the sex of the employee.

12. Plaintiffs failed to prove that Owens-Illinois engaged in any policy, pattern, or practice of terminating Black employees because of their race.

13. Job vacancies in the hourly jobs at the Oakland plant have been filled without regard to the employee's race. Where a job vacancy was a promotion pursuant to a collective bargaining agreement, the job was filled pursuant to the terms of the collective bargaining agreement, without regard to the race of the applicant. Where the job was not a promotion within a department, but was an entry into the department, it was filled without regard to the race of the applicant.

14. Vacancies in salaried jobs at the Oakland plant were filled without regard to the race of the applicant.

15. Job vacancies in the Teamster, Warehouse, Corrugated and Mold Repair depart-

ments required that the vacancies be filled through hiring halls pursuant to collective bargaining agreements between Owens-Illinois and the unions which represented the employees within the departments. Entry into the Maintenance, Central Mold Shop, Machine Repair and Forming departments were through apprenticeship programs administered by the union which represented the employees in the department and Owens-Illinois. The use of the union hiring halls and the use of the apprenticeship programs did not discriminate against any Black employees because of their race.

16. There is no evidence that Black employees as a class were denied jobs for which there were vacancies since March 7, 1971.

17. Since March 7, 1971, the procedure for promotion of hourly employees and the pay

of those employees has been covered by collective bargaining agreements between Owens-Illinois and the union representing the employees of the department. The requirements of the agreements for promotion and pay of union employees has been adhered to by Owens-Illinois at all times since March 7, 1971; and the effect and impact of the provisions of the collective bargaining agreements has not had any adverse impact or effect upon Black persons as a class and has not had the effect of denying any job or promotion or pay increase or any other term or condition of employment to any Black person because of his race.

18. Since March 17, 1971, there was no evidence that Black persons as a class were denied jobs for which there were vacancies in any department at the Oakland plant.

19. During the trial plaintiffs offered evidence of isolated acts or practices which

had occurred prior to March 7, 1971 with respect to Black persons. There was no evidence that any of those acts or practices continued, or had any present effect or impact upon Black persons, subsequent to March 7, 1971.

20. Since March 7, 1971 Owens-Illinois has not engaged in any policy, pattern or practice in hiring employees at its Oakland plant which either discriminated against, or had any adverse impact or effect upon Black persons because of their race.

CONCLUSIONS OF LAW

[1] 1. This claim was brought pursuant to F.R.Civ.P., Rule 23(b)(2), by plaintiffs who sought to represent, and were certified to represent, a class of all Black employees who were employed by Owens-Illinois at any time since March 7, 1971.

2. Since March 7, 1971, Owens-Illinois has not engaged in any pattern or practice

which discriminated against its Black employees as a class in violation of either 42 U.S.C. § 1981 or Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

3. Such class of employees are not entitled to relief, injunctive or otherwise.

CLASS OF FEMALE EMPLOYEES

1. Since March 23, 1974 the Owens-Illinois Oakland plant has at all times employed between 1600 and 2000 employees in approximately 21 departments. Between 30% and 35% of the work force during this period of time have been female employees.

2. Since March 23, 1974 approximately 70% of the job vacancies at the Oakland plant have been in three job classifications: lehr attendant, carton assembler, and selector.

3. The job of selector requires the employee to inspect bottles which are moving

along an assembly line and to pack them into cartons for delivery. The selector must check the quality of bottles and discard the defective ones. The job requires a small amount of manual dexterity but generally can be accomplished by anyone.

4. The job of carton assembler requires the employee to take flat pre-stamped pieces of corrugated cardboard and assemble them into cartons and place the separators inside of them. This job requires some small degree of manual dexterity and may require a degree of strength as occasionally cardboard blanks in bundles must be lifted; however, basically anyone can perform this job.

5. The job of lehr attendant requires the employee to remove cartons filled with bottles of various sizes from a rapidly moving conveyor and place them on trailers and pallets

at the rate of between 10 and 30 boxes a minute. This job requires little manual dexterity, however, it is extremely physically demanding and exhausting and requires a great deal of endurance and physical strength.

6. At all times since March 23, 1974 the pay of lehr attendants, selectors, and carton assemblers have been set forth and required by collective bargaining agreements between Owens-Illinois and the Glass Bottle Blowers Association Union.

7. Since March 23, 1974 very few women have filled the lehr attendant job.

8. Since March 23, 1974 most of the carton assemblers and selectors have been women.

9. Since March 23, 1974 almost all selector job vacancies have been filled from outside Owens-Illinois. Applicants for this

job were received from the Department of Human Resources Development, screened in the company personnel office, and sent to the selecting foreman for ultimate hiring or rejection. Most persons sent by the Department of Human Resources Development were ultimately hired.

10. Since March 23, 1974 carton assembler and lehr attendant job vacancies have been filled from outside of Owens-Illinois by the above described procedure and by job postings. The job posting is a procedure whereby a notice of the job opening is posted throughout the plant, union employees sign the job posting, and the job is filled on the basis of seniority. Since the job of lehr attendant continually has vacancies in it, a permanent lehr attendant job posting was kept in a personnel office. All persons signing a job posting for lehr attendant or carton assembler had priority

over any non-Owens-Illinois employee for these jobs.

11. Since March 23, 1974 very few women signed job postings or otherwise applied for lehr attendant jobs despite the fact that the job postings on their face stated "females are encouraged to apply." Women who did sign up for the job of lehr attendant and were the most senior on the list were awarded the job with rare exception.

12. Lehr attendant job postings were, generally speaking, awarded to persons with low seniority. On the other hand, other jobs in the selecting department, such as inspector and lehr foreman, were invariably awarded to persons with extremely high seniority (between 10 and 20 years). The result was that many women who were unable to achieve inspector jobs could easily have posted for the received

lehr attendant jobs but elected not to take the lehr attendant job. On occasion, when Owens-Illinois laid off employees from the selecting department, women selectors with higher seniority than male lehr attendants elected to be laid off rather than take the lehr attendant job which they could have obtained.

13. The lehr attendant job is performed standing up and has not become physically less demanding over the years; whereas the selector job is performed sitting down and has become easier due to mechanization over the years.

14. There was no evidence that a single woman applied for or posted for the job of lehr attendant and was refused such job.

15. Since March 23, 1974, most of the women employed at the Oakland plant were employed

in the finished products department and very few women, if any, were employed in the mold repair, central mold shop, corrugated, forming, trucking, warehouse, maintenance, and batch and furnance departments.

16. In the departments in which few women have been employed since March 23, 1974 there is a very low rate of turnover and most the employees employed in those departments during this period of time were employed by Owens-Illinois prior to March 23, 1974. Approximately 75% of all job vacancies during this period of time have occurred in the lowest entry level positions at the Oakland plant classified in the EEO category of operatives and laborers.

17. Since March 23, 1974 women were employed when qualified and available in the vacancies in the eight departments in which

few women are employed. Thus, since March 23, 1974 at least seven women were employed in the batch and furnace department as general laborers, at least two women were employed in the maintenance department as apprentices, at least one woman was employed in the machine repair department as a machinist helper, at least one woman was employed in the central mold shop as a mold inspector, at least six women were employed in the corrugated department as corrugators and a large number of women were employed in the maintenance department. Additionally, some women who were hired since March 23, 1974 in these departments subsequently quit or left Owens-Illinois for their own reasons and these persons are not reflected in either the exhibits or the plaintiffs' or defendant's statistics.

18. In the departments in which very few women were employed since March 23, 1974

all jobs above entry level were filled throughout job postings. Entry level jobs in trucking, warehouse, corrugated, and mold repair were filled exclusively from union hiring halls; maintenance, central mold shop, and forming from apprenticeship programs. The hiring hall and apprenticeship program mechanisms were established pursuant to union-management agreements and were administered jointly by the union and the company. There was no evidence that the hiring halls or apprenticeship programs had a discriminatory purpose or effect.

19. Most entry level jobs in the mold repair, trucking, central mold shop, machine repair, forming, warehouse, batch and furnace, and maintenance department, require a high degree of specialized skill or are extremely dirty, heavy work.

20. Since March 23, 1974 there was no evidence that a qualified woman applied for

and/or was denied a vacancy in the machine repair, central mold shop, corrugated, forming, trucking, warehouse, maintenance, and batch and furnace departments. There was, however, evidence of women being offered and accepting or refusing entry level positions and apprenticeships in these departments.

21. Plaintiffs introduced a myriad of statistics during the trial. These statistics were, in large part, confused, and misleading. The statistics relied upon unreal and contrived wage and pay figures, excluded large populations of the plant including new hires and non-Black minorities, and were deficient in other ways.

22. Since March 23, 1974 between 32% and 37% of the employees hired at the Oakland plant have been women. There was no evidence that any qualified woman applied for and was denied employment at the Oakland plant.

23. Since March 23, 1974 the terms and conditions of the employment including pay, promotions, terminations, and treatment of 90% of the female employees was governed, in large part, by the collective bargaining agreements between the company and the union which represented employees in each of the separate departments, and the Court finds these agreements to be non-discriminatory.

24. Since March 23, 1974 the Oakland plant had in effect salary and hourly job posting mechanisms whereby vacancies in 95% of the positions at the Oakland plant were brought to the attention of all employees who then had an opportunity to bid on such jobs. Approximately 90% of the time the job was then awarded to the senior person. If the senior person was not awarded the job, it was because such person lacked the necessary qualifications for the job.

25. During the course of the trial, plaintiffs introduced evidence of Owens-Illinois' dealings with the federal government compliance agencies, including the adoption by the Oakland plant of a special program for an "affected class" which included women who were purportedly not promoted out of the selector job between 1942 and 1973. However, this action and other activities between the office of the contract compliance and Owens-Illinois regarding enforcement of the Executive Orders 11246 and 11375 were not per se probative of any discriminatory activity at the Oakland plant after March 23, 1974.

26. That Owens-Illinois management has discretion to decide who will be promoted to a few union positions and all non-union positions by being the primary judge of whether an applicant has the ability for a particular job.

27. That Owens-Illinois has used its discretion to promote men over women because of their sex.

28. That there is a large available pool of women both within the plant and in the surrounding communities who are qualified for managerial positions.

29. That throughout the relevant period, Owens-Illinois has intentionally engaged in a pattern of practice of promoting only men into its management positions even though qualified women were available.

30. That there are no written standards or guidelines for promotion to management level jobs. All promotions except for the top five positions at the plant are determined by the individual supervisor of the departments in which there is a management vacancy. There is no system whereby any management job openings

are publicized to the employees, and there is no system of applying for these jobs. Normally, supervisors choose a candidate for a job without the candidate's knowledge.

31. That throughout the relevant period, Owens-Illinois has had management training positions in which it has placed men both as new hires and as transfers from other jobs in the company. The position of student industrial engineer in the cost control department was the major training job for management employees. Women were not chosen for entry into this program even though qualified women were available at the plant and in the general population.

32. That despite the fact that most employees in the finished products/selecting department are women, virtually none of the supervisors of that department have been women during the relevant period.

33. That the policies and practices of Defendant regarding promotion, especially into management positions, have unduly restricted females both from promotions into these positions and from the promotion process itself, since the Oakland plant has had virtually no female supervisors or management personnel.

CONCLUSIONS OF LAW

[2] 1. That Defendant has engaged in conduct with the purpose and effect of discriminating against women, on account of sex, in that Defendant has:

a. Unduly limited the initial hiring of women for management training positions.

b. Unduly limited the promotion of women to supervisory and management level positions.

2. That this Court shall determine appropriate relief in accordance with these findings.

CLAIM OF AUNITA JONES

1. Aunita Jones is a 31-year-old Black woman.

2. Aunita Jones was hired by Defendant Owens-Illinois on July 14, 1971 as a secretary in the personnel department at Defendant's Oakland Plant.

3. Aunita Jones was the first Black employee ever hired by Defendant in its personnel department at its Oakland Plant.

4. Before she was hired, Aunita Jones was interviewed by Defendant's assistant personnel director, Mike Lunny. During this interview Mr. Lunny asked Ms. Jones how she would respond if she were called a "nigger." He told her that as the first Black person

hired in the personnel department, her performance would determine whether other Blacks were hired into personnel.

5. After she began working for Defendant, Aunita Jones was subjected to racial insults by a co-worker. Aunita Jones complained to her supervisors about this conduct including the director of personnel, but no apparent remedial action was taken, and Aunita Jones continued to be subjected to this treatment.

6. In November 1974, Mr. Joe Woods was placed in the assistant personnel director's job. Bart Oxley then asked Aunita Jones to train Mr. Woods even though he continued to maintain that she was unqualified for the job. In December 1974, Aunita Jones transferred out of the personnel office to the maintenance department as a secretary.

7. Thereafter on several occasions Aunita Jones complained to the personnel director about racially discriminatory policies of the company and about his conduct in particular in racial matters.

8. In June 1975, Aunita Jones was accused by Defendant of forging the name of a doctor employed by the company to a disability claims form which Aunita Jones had submitted to her own private insurance company.

9. Aunita Jones at all times denied she had committed this forgery.

10. Defendant did not in good faith believe that Aunita Jones had forged the form.

11. The claims form was not related to any job duties for which Aunita Jones was responsible.

12. Defendant terminated Aunita Jones on June 6, 1975. The reason stated for term-

ination was that Aunita Jones had forged the claims form. Defendant also charged alternately that Aunita Jones had not recorded days she was sick on her attendance card.

13. In fact, Aunita Jones had recorded her days absent but she had mistakenly recorded the absence in the wrong week. Defendant was aware and informed that Aunita Jones had in fact recorded all her absent days.

14. The reasons stated by Defendant for terminating Aunita Jones were a mere pretext. In fact, Aunita Jones was terminated by Defendant because of her race and because of her outspoken opposition to discrimination against Black persons by Defendant.

15. The acts of Defendant described above were done intentionally and wantonly and for the purpose of discriminating against Aunita Jones because of her race and her actions

to combat the racially discriminatory acts of Defendant.

16. Defendant did not subject its White employees to the treatment described above which Defendant subjected Aunita Jones to.

17. That at the time Aunita Jones was terminated on June 6, 1975, she was employed in Grade 4 position as a secretary in the Maintenance Department.

18. That she became employed at the rate of $600.00 per month in August, 1975.

19. That she received $50.00 raises every six months.

20. That as of July 24, 1978, she was earning $850.00 per month.

21. That therefore Aunita Jones earned $25,400 since her termination.

22. That Aunita Jones would have earned an additional $6,888.50 if she had continued to be paid at the same rate, with normal raises, as she was paid as of her termination date.

23. Since March 7, 1971, Owens-Illinois did not engage in any act or practice in her compensation, training, or promotion which either discriminated against, or had any adverse impact or effect upon, Aunita Jones because of her race.

24. Since March 23, 1974, Owens-Illinois did not engage in any act or practice with respect to her compensation, training, promotion, treatment, termination, or terms, conditions, or privileges of employment which discriminated against Aunita Jones, or had any adverse impact or effect upon her, because of her sex.

CONCLUSIONS OF LAW

[3] 1. Since March 23, 1974, Owens-Illinois did not discriminate against Aunita Jones

because of her sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

2. Defendant Owens-Illinois did discriminate against Aunita Jones on the basis of her race in violation of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and Aunita Jones is entitled to a judgment against Owens-Illinois, Inc. in the amount of $15,000 compensatory damages, $15,000 punitive damages and back pay of $6,888.50.

CLAIM OF ROBERT HAROLD

1. That Robert Harold is a Black male who worked for Owens-Illinois from April 9, 1968, to September 6, 1977. He became the first Black maintenance mechanic at the plant after completing the apprentice program.

2. That during the relevant period, Robert Harold was a temporary leadman eight

or nine times and was the first Black temporary leadman.

3. That when Robert Harold was temporary leadman the Defendant failed to support his authority while it did support the authority of similarly situated White employees.

4. That on one occasion when Robert Harold was temporary leadman, one of his crew threw water in his face; and that the management official in charge and present at that time intentionally and wantonly did nothing to indicate company disapproval and in fact intentionally and wantonly joined in the amusement of the all-white crew thereby ratifying said action and failing to support the authority and dignity of a temporary leadman whereas the company did so support the authority and dignity of similarly situated White employees.

5. That on one occasion, when Robert Harold was a temporary leadman, a member of

his crew named George set the time clock ahead so that he could leave early and still be paid for an eight hour day.

6. That Robert Harold reported this incident to the proper company official and yet the company paid George his full eight hour salary, thereby intentionally and wantonly failing to support the authority of Robert Harold as temporary leadman whereas the company did so support the authority of similary situated White employees.

7. That on several occasions when Robert Harold was a temporary leadman, Steve Greenwood, a member of his crew, refused to carry out the assignment given to him by Robert Harold.

8. That Robert Harold reported this to the proper company official and that no action was ever taken by the company and there-

by the company intentionally and wantonly refused to support the authority of Robert Harold as temporary leadman whereas the company did so support the authority of White employees similarly situated.

9. Since March 7, 1971 Owens-Illinois did not engage in any act or practice with respect to his compensation, placement, promotion or termination, which discriminated against Robert Harold or had any adverse impact or effect upon him because of his race.

CONCLUSIONS OF LAW

[4] Defendant Owens-Illinois did discrimate against Robert Harold on the basis of his race in violation of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. and Robert Harold is entitled to compensatory damages in the amount of $5,000, and punitive damages in the amount of $15,000.

CLAIM OF ALICE BRICE

1. Alice Brice is a Black woman who has been employed by Defendant from May 18, 1964 to the present time.

2. That Alice Brice has a B.S. Degree in business which she received prior to applying to Owens-Illinois for work.

3. That Alice Brice received a teaching credential as a result of her graduation from college in the State of Arkansas and subsequently in 1969 received one from the State of California.

4. That when hired at the company, Alice Brice was assigned the job of traffic clerk. She was promoted to the job of shift dispatcher on July 1, 1972 and was then promoted to traffic representative on August 16, 1974, to Traffic Supervisor on August 1, 1977, and she continued to hold that job as of the time of trial.

5. That despite her college degree and experience with the company Ms. Brice was refused on the basis of her race and sex a job in the industrial engineering department which is the normal position for management trainees, even though she requested such placement.

6. That a supervisor told Alice Brice that she was not to speak to another Black employee who was a teletype operator and who had to converse with Alice Brice in the course of her daily work. Other women in the department spoke to each other, but no White woman was ever told to cease speaking to other women in the department.

7. That Alice Brice took a leave of absence for her pregnancy on January 31, 1972. She was allowed only six weeks for pregnancy leave even though other employees were allowed six months.

8. As a result of the discrimination experienced at the company, Alice Brice experienced serious hypertension while she was pregnant in 1972 and had to be treated for this. The diagnosis was confirmed by the company doctor as well as her treating doctor.

9. That Alice Brice, while in the traffic department did her work very well and needed very little supervision and was very accurate.

10. That Alice Brice complained to the Fair Employment Practices Commission of the State of California in 1971. A representative of the organization called Mr. Bart Oxley who stated that she did not have to pursue the complaint with the FEPC since he understood that her supervisor was a problem and he would try to take care of it. Nothing was changed as a result of this complaint.

11. Soon after this, upon return from maternity leave, Alice Brice was offered the job of shift dispatcher on the swing shift. She was told that this was to include a pay increase and an 8% shift differential and overtime pay for working on Sunday.

12. That because of her race and sex no pay raise was given to Alice Brice when she took over the job of shift dispatcher which was one grade level higher than her previous job; she was also not given a shift differential and overtime pay as had been promised to her.

13. That because of her race and sex when she became radio dispatcher she was ordered to take on the additional duties of the shipping clerk on her shift, which included typing and filing. At that time there were three other radio dispatchers, all of whom were White

males. Alice Brice was the first female radio dispatcher. None of the other radio dispatchers had to do the work of the shipping clerk. The shipping clerk who had previously worked on the same shift as Alice Brice was moved off the shift and only Alice Brice was told to do that work. There was no extra pay for doing this work.

14. Alice Brice was also ordered to take on additional duties of receiving records and time cards which the other dispatchers did not have to do.

15. Charles Santillanes, whose job Alice Brice took over, was directed by the supervisor of that department that he should not train her because he did not want her in the department.

16. During this time she worked as dispatcher and also doing the extra work as

shipping clerk, she was suffering from glaucoma, dizzy spells, and general hypertension. She had to take medication for the hypertension from this time in 1973 and has continued to have to take it through the present time.

17. Alice Brice requested to be trained as a service representative in the spring of 1974. There was no posting system for higher level salaried jobs and she was never invited to take any jobs other than the shift dispatcher job up until that time. The only way to obtain a promotion in the higher level salaried range was to be offered a job by a supervisor or higher management person. Sometime after 1974 a promotion committee was set up to review some of the management promotions. It did not review all promotions as some supervisors still made their own decisions.

18. That Alice Brice, after making this request, approached Willie Huff, the EEO

Coordinator at the plant, as a member of the promotion committee in an attempt to get promoted into the service department. She was informed that the head of the service department felt that women should stay home and have babies and she could not get the job. Upon objecting to the refusal to Bart Oxley, the personnel director, Alice Brice was told it was the feeling of the company that she would be offensive as a service representative although he would not explain the remark and had not so treated White employees. Alice Brice was qualified for that job.

19. That on September 23, 1972 Alice Brice, with other Black employees, signed a petition addressed to management officials of Defendant complaining of the lack of opportunities for Black employees. As a result she was called into the office of her supervisor

and told that she was not discriminated against by him but he admitted her prior supervisor had discriminated against her.

20. In 1974 Alice Brice requested consideration for the traffic representative job which she discovered was to be vacant. She spoke to her immediate supervisor, but he did nothing to assist her in getting the job and therefore she wrote a letter to Mr. Willie Huff, the EEO Coordinator.

21. That Alice Brice was not considered as the primary candidate for the job by the plant manager and the personnel director at the promotion committee meeting. Subsequent to the meeting a letter was written by Mr. Huff, the EEO Coordinator, further recommending Alice Brice and subsequently on August 16, 1974 Alice Brice was then given the job of traffic representative, but only on condition

that she take certain courses that White males before her had not had to take.

22. That because she was Black her authority was not supported by management when a White subordinate would not work for her and walked off the job. The employee was not penalized for her behavior and received a transfer to another department.

23. That when Alice Brice was given the traffic representative job she received a pay increase from $770 to $850 per month, the minimum salary range for her new job. Even though the job was ordinarily an exempt job, her starting salary was too low to consider her exempt, so therefore she was initially considered a non-exempt employee and was paid for over-time.

24. That after receiving this job Alice Brice again requested to be trained as

an Industrial Engineer and asked to be considered for distribution manager in the warehouse. Because of her race and sex no response was given to her by her supervisors and management officials on this request.

25. That on September 9, 1974, Alice Brice signed a letter directed to the President of the corporation complaining of racial problems in reference to the letter previously sent in 1972. Alice Brice was a signatory amoung six Black individuals who signed the letter (Exhibit #70).

26. That because she was Black and a woman she was not allowed to take the Dale Carnegie course that was generally given to all management personnel at Owens-Illinois by her supervisor when she specifically requested it.

27. That because of her race and sex she was denied the job of trucking supervisor,

for which she was qualified, since she knew about rates and tariffs and has perviously worked in the shipping department. Upon complaining about this to management she was informed by her supervisor that the shipping supervisor, Dave Hattig, said he wasn't ready to have a woman report to him.

28. That Alice Brice continues to request and is qualified for promotions but, because of the intentional discrimination of Defendant she has received none since 1977.

29. The acts of Defendant described above had the purpose and effect of discriminating against Alice Brice because of her race and sex and her actions to combat the discriminatory acts of Defendant.

30. Alice Brice has suffered a loss in pay as a result of said discriminatory practices described above in an amount equal

to the difference between the wages and salary actually received by her and the sum she would have received had she been earlier promoted to the jobs for which she was qualified, and which were filled by others. The amount shall be computed after further hearing.

31. That Alice Brice suffered a serious medical and nervous condition since 1972 due to the discrimination caused by Owens-Illinois for which she has been continually treated by Kaiser Hospital. Said discrimination has affected her private life and caused marital problems between her and her husband. She had a worsening of the glaucoma problem in her eye and has had rashes, hair loss and sleeping problems.

CONCLUSIONS OF LAW

[5] Defendant Owens-Illinois did discrimate against Alice Brice on the basis of her race

and sex in violation of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and Alice Brice is entitled to a judgment against Owens-Illinois, Inc. in the amount of $50,000 compensatory damages, $15,000 punitive damages and back pay in an amount to be fixed by the Court after further hearing.

OTHER INDIVIDUAL CLAIMS

LOUIS ALTHEIMER

1. Louis Altheimer is a Black male employed at the Oakland Plant since July 22, 1963.

2. Louis Altheimer filed an EEOC charge against Owens-Illinois on April 7, 1977.

3. Since March 7, 1971, Owens-Illinois did not engage in any act or

practice with respect to his compensation, terms of employment, promotions, demotion, or treatment, which discriminated against, or had any adverse impact or effect upon, Louis Altheimer because of his race.

4. Louis Altheimer was not offered the position of a salaried foreman at a salary less than the salary being offered to another person who was not Black.

5. Louis Altheimer was demoted in March, 1977 from relief foreman to fork lift driver because of his harassment of two female employees at the Oakland Plant, his becoming involved in an altercation with a subordinate employee, his general poor work performance, and his inability to perform the job of relief foreman. The demotion was in no way based upon the fact that he was Black.

6. There was no credible evidence that Louis Altheimer was harassed or discrimated

against in job assignments, or disciplined, or criticized in any manner because of his race.

MARSHALL DAILEY

1. Marshall Dailey is a Black male who was hired at the Oakland Plant on November 3, 1969 and was terminated on July 12, 1972.

2. Marshall Dailey filed an EEOC charge on August 3, 1972.

3. Since March 7, 1971 Owens-Illinois did not engage in any act or practice with respect to his promotion, termination, treatment, compensation, terms, condition or privileges or employment which discriminated against or had any adverse impact or effect upon Marshall Dailey because of his race.

4. Since March 7, 1971 Owens-Illinois did not assign the most difficult, onerous, or dirty jobs to Black employees as a class, or to Marshall Dailey individually.

5. On July 7, 1972 Marshall Dailey refused to perform work properly assigned to him by his foreman and he walked off the job without authority. He was terminated because of his refusal to work and his having walked off the job. Such termination was uniformly applied to Owens-Illinois employees who engaged in similar conduct, and was not applied to Marshall Dailey because of his race.

6. Since March 7, 1971 Owens-Illinois did not retaliate against any employees, including Marshall Dailey, because of their complaints to the EEOC, or to company management.

GAIL GARRETT

1. Gail Garrett is a Black female who was hired at the Oakland Plant on December 16, 1970. She was terminated on January 14, 1975.

2. Gail Garrett filed an EEOC charge on February 7, 1975.

3. Since March 7, 1971, Owens-Illinois did not engage in any act or practice with respect to her compensation, promotion, termination, treatment, terms, condition or privileges of employment which discriminated against Gail Garrett, or had adverse impact or effect upon her because of her race.

4. Since March 23, 1974, Owens-Illinois did not engage in any act or practice with respect to her compensation, promotion, termination, treatment, terms, condition or privileges of employment which discriminated against Gail Garrett, or had any adverse impact or effect upon her because of her sex.

5. Owens-Illinois did not refuse to rehire Gail Garrett after her termination because of her race or sex.

6. Owens-Illinois did not refuse to give Gail Garret training as a PBX operator and a teletype operator because of her race.

7. The failure to promote Gail Garrett to keypunch supervisor was not because of her race or sex.

8. Gail Garrett was not required to do more work than either male or White employees doing the same job or receiving the same pay as she, nor was she required to do more work or work under more severe conditions because of her race or sex.

9. The request made to Gail Garrett to work during the strike in 1974, or the request for her to work during July 4, 1974, or during evenings, were requests made of other salaried employees and were not made to her in an attempt to harass her or mistreat her because of her race or sex.

10. Gail Garrett was discharged on January 14, 1975 for cause because of her insubordination and conduct which created an

irreconcilable conflict between Gail Garrett and her supervisor, Mary Villa. The discharge was not because of her sex, or because of her race.

CHARLOTTE HARRIS

1. Charlotte Harris is a Mexican-American female who was hired at the Oakland Plant on August 3, 1966. She entered an apprenticeship program at the Oakland Plant on January 30, 1975, and was terminated from that program on December 30, 1976. She is currently an employee at the Oakland Plant.

2. Charlotte Harris filed an EEOC charge on January 11, 1977.

3. Since March 23, 1974, Owens-Illinois did not engage in any act or practice with respect to her compensation, placement, training, promotion, treatment, terms, conditions or

privileges of employment which discriminated against Charlotte Harris or had any adverse effect or impact upon her because of her race or sex.

4. Since March 23, 1974, Owens-Illinois did not discriminate against Charlotte Harris in admission to, or termination from, any program established to provide apprenticeship or other training because of her race or sex.

5. The requirement that Charlotte Harris take certain courses in her apprentice program was a requirement uniformly applied to all apprentices, and was not a requirement of Charlotte Harris because of her sex or race.

6. The requirement that Charlotte Harris enter the apprentice program, and the refusal to make her a maintenance mechanic without such apprentice program was uniformly

applied to persons of her ability and qualifications to perform the job of maintenance mechanic, and was not a requirement of Charlotte Harris because of her race or sex.

7. Charlotte Harris was not harassed, or subjected to treatment or requirements not required of other persons in the apprenticeship program.

8. The requirement that Charlotte Harris complete a mathematics course was a requirement uniformly applied to all apprentices. Charlotte Harris failed to complete the mathematics courses within the time required. She was terminated by the joint apprentice committee composed of (1) members of the union which represented persons in the maintenance department and (2) members of management. She was terminated because she failed to complete the mathematics course.

9. Charlotte Harris has been promoted and has received pay increases comparable to other employees of equal seniority and ability, without regard to their race or sex. There is no evidence that she was denied any promotion or denied any pay raise because of her race or sex.

10. When Charlotte Harris was terminated from the apprenticeship program, she returned to a job in the Selecting Department. This was the only vacancy available. The return of Charlotte Harris to this job was not a reduction in pay or mistreatment in terms or conditions of employment because of her race or sex. She has subsequently been promoted when other jobs became available as a result of her seniority.

JUDY WEEK

1. Judy Week is a White female who was employed at the Oakland Plant on June 16, 1965.

2. Judy Week filed an EEOC charge on June 29, 1976.

3. Since March 23, 1974, Owens-Illinois did not engage in any act or practice in connection with her compensation, training, promotion, treatment, or terms, conditions, or privileges of employment which discriminated against Judy Week, or had any adverse impact or effect upon her, because of her sex.

4. From March 23, 1974, to the time of trial, Judy Week was promoted to cost and budget clerk and later to cost accountant in the central mold shop. She was not denied any promotions because of her sex.

5. In late 1975, Judy Week was asked to perform additional duties. Her supervisors complained that she was unable to perform these duties adequately, and Judy Week admitted that she was unable to perform these duties. The complaints of her performance were not harassment of Judy Week because of her sex.

6. In early 1976, Judy Week complained that she needed training for her job. A program was established to provide for her training. She was not denied training because of her sex.

CURTIS WILLIAMS

1. Curtis Williams was employed at the Oakland Plant on October 21, 1964. He was terminated on May 19, 1972.

2. Curtis Williams filed an EEOC charge on January 21, 1975.

3. In 1973, Curtis Williams sought reemployment at the Oakland Plant. He was denied employment at the Oakland Plant, but was hired by the Forest Products Division of Owens-Illinois at a plant in Union City, California. Curtis Williams voluntarily terminated his employment at the Forest Products Division plant in Union City, California on February 6, 1973.

4. Since March 7, 1971, Owens-Illinois did not engage in any act or practice with respect to termination, compensation, training, promotion, treatment, terms, conditions, or privileges of employment of Curtis Williams which discriminated against him, or had any adverse impact or effect upon him, because of his race.

5. The failure of Owens-Illinois to rehire Curtis Williams at the Oakland Plant was not because of his race.

6. Curtis Williams was not denied any promotions because of his race, or because of any retaliatory action against him because of complaints to management.

7. Curtis Williams was not denied a promotion to foreman because of his race.

8. Owens-Illinois did not harass Curtis Williams or treat him differently than other employees.

9. In May, 1972, Curtis Williams failed to report to work for a five day period and was terminated. Termination for failure to report to work for five days was equally applied to all employees, regardless of race, and Curtis Williams was not terminated because of his race.

10. At all times Curtis Williams was paid wages as provided by the agreement between Owens-Illinois and the union which represented

the employees in the department where Curtis Williams worked. He was not denied any pay, nor was he treated differently with respect to pay, because he was Black.

EUGENE WILLIAMS

1. Eugene Williams is a Black male who has been employed at the Oakland Plant since July 10, 1964.

2. Eugene Williams filed an EEOC charge on September 3, 1971.

3. Since March 7, 1971, Owens-Illinois did not engage in any act or practice with respect to his compensation, training, promotion, treatment, or terms, conditions, or privileges of employment which discriminated against Eugene Williams or had any adverse impact or effect upon him because of his race.

4. Eugene Williams was promoted to a crew leader in 1974. At no time prior to that was he denied any promotion because of his race, and at no time prior to that was any person, less senior or less qualified, appointed to a crew leader job ahead of him.

5. Owens-Illinois did not deny Eugene Williams the right or ability to become a member of the International Brotherhood of Teamsters.

6. Owens-Illinois did not assist any persons to become members of the International Brotherhood of Teamsters and did not refuse to assist Eugene Williams to become a member of that union because of his race.

7. Eugene Williams was offered an apprenticeship position in the Maintenance Department, which he refused. Owens-Illinois did not permit any person to become a maintenance

mechanic with similar or fewer qualifications than Eugene Williams. He was not denied the opportunity to immediately become a maintenance mechanic because of his race, but was denied the job because of his inability to perform the work required of a maintenance mechanic without apprenticeship training.

8. Eugene Williams was not denied the position of supervisor of the Forming Department or supervisor of the Selecting Department because of his race, but because more qualified persons were appointed in each of those jobs when they become vacant.

9. Eugene Williams was not denied any training which would have permitted him to become a shift foreman.

10. AVO's placed into Eugene Williams' file because of performance or attendance were not placed there because of harassment

or retaliation against him because he was Black, or because he has complained to management about discrimination. Such AVO's were customarily placed in the files of other employees, regardless of their race, because of conduct similar to that of Eugene Williams.

11. In 1976, Eugene Williams was appointed to the job of Assistant Selecting Foreman. At the time he had the lowest seniority of any of the persons who were appointed to that position.

12. The shift foremen who were appointed between 1970 and 1976, prior to Eugene Williams, all were employed by Owens-Illinois prior to the time Eugene Williams was employed by Owens-Illinois, and all had greater seniority.

FLOYD WILLIAMS

1. Floyd Williams is a Black male who was hired at the Oakland Plant on March 21,

1962. Floyd Williams was terminated on September 11, 1974.

2. Floyd Williams filed an EEOC charge on September 23, 1974.

3. Since March 7, 1971, Owens-Illinois did not engage in any act or practice with respect to his termination, compensation, training, promotion, treatment, or terms, conditions or privileges of employment which discriminated against Floyd Williams, or had any adverse impact or effect upon him, because of his race.

4. Floyd Williams was interviewed for a job as sales representative for Owens-Illinois. His interview was conducted in the same manner in which all interviews of other employees were conducted. The persons interviewing Floyd Williams determined that he was not qualified for the position of sales represen-

tative. The decision of such persons was based upon his lack of qualifications, and was not based upon his race.

5. Floyd Williams was not denied the opportunity to participate in the glass bottle quality audits. He declined to participate in such audits because he had outside employment which did not permit him to work overtime.

6. Floyd Williams was not denied any training because of his race.

7. Floyd Williams was not denied any promotions because of his race. Because of his ownership of a motel, he took substantial leaves of absence and did not work overtime. As a result of such leaves of absence and inability to work overtime, he was not promoted. The failure to promote Floyd Williams was because of his outside activities, and not because of his race.

8. Floyd Williams was not harassed, nor was there any retaliation against him, because of his participation in group meetings where complaints of racial discrimination were made to management, nor was there any retaliation, or harassment, because of his complaints to the EEOC.

9. Floyd Williams was warned for being away from his work in June, 1974. Other employees who were away from their work were terminated. His treatment as a result of the incident was neither harassment nor retaliation.

10. Floyd Williams was terminated September, 1974, because he threatened his supervisor. He had previously been warned about conduct directed towards management. The termination of Floyd Williams was because of his threatening conduct, and was not because of his race. Any other employee, who had

engaged in similar conduct, would have been terminated regardless of that employee's race.

CONCLUSIONS OF LAW

[6] 1. Since March 7, 1971, Owens-Illinois did not discriminate against Louis Altheimer because of his race in violation of either 42 U.S.C. § 1981 or Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

2. Since March 7, 1971, Owens-Illinois did not discriminate against Marshall Dailey because of his race in violation of either 42 U.S.C. § 1981 or Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

3. Since March 7, 1971, Owens-Illinois did not discriminate against Gail Garrett because of her race in violation of either 42 U.S.C. § 1981 or Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

4. Since March 23, 1974, Owens-Illinois did not discriminate against Gail Garrett because of her sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

5. Since March 23, 1974, Owens-Illinois did not discriminate against Charlotte Harris because of her race or sex in violation of Title VII of the Civil Rights Act of 1064 [sic], 42 U.S.C. § 2000e et seq.

6. Since March 23, 1974, Owens-Illinois did not discriminate against Judy Week because of her sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

7. Since March 7, 1971, Owens-Illinois did not discriminate against Curtis Williams because of his race in violation of either 42 U.S.C. § 1981 or Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

8. Since March 7, 1971, Owens-Illinois did not discriminate against Eugene Williams because of his race in violation of either 42 U.S.C. § 1981 or Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

9. Since March 7, 1971, Owens-Illinois did not discriminate against Floyd Williams because of his race in violation of either 42 U.S.C. § 1981 or Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

The foregoing Findings of Fact and Conclusions of Law are made this Eighth day of January, 1979.

JUDGMENT

The trial of this action having commenced on July 12, 1978, before the Court and a jury, and the jury having reached both advisory and binding verdicts on October 2, 1978, and the Court having issued its Findings of Fact and Conclusions of Law on January 8, 1979,

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. This action is maintainable as a class action pursuant to Fed.R.Civ.P., Rule 23(b)(2), on behalf of the following two classes: (a) all blacks who were employed at defendant's Oakland plant at any time since March 7, 1971; (b) all women who have been employed at defendant's Oakland plant since March 23, 1974.

2. The certified class of all black employees who were employed at defendant's Oakland plant since March 7, 1971, is entitled to no relief, and its claims and the complaint on its behalf are dismissed.

3. The certified class of all female employees who have been employed at defendant's Oakland plant since March 23, 1974, is entitled to equitable relief in the terms of the Remedial Order which is attached hereto as Exhibit 1 and incorporated herein by reference.

4. Plaintiff Robert Harold shall recover from defendant, $5,000 compensatory damages and $15,000 punitive damages, for a total sum of $20,000, in accordance with the verdict of the jury.

5. Plaintiff Aunita Jones shall recover nothing on her claim of sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., but shall recover from defendant Owens-Illinois, Inc., $15,000 compensatory damages and $15,000 punitive damages, in accordance with the verdict of the jury, and back pay in the amount of $6,888.50 in accordance with Court's Findings of Fact and Conclusions of Law, for a total sum of $36,888.50 for violation of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq.

6. Plaintiff Alice Brice shall recover from defendant, $50,000 compensatory damages

and $15,000 punitive damages in accordance with the verdict of the jury and back pay in the amount of $15,061.34 for violations of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and defendant is further ordered to pay Alice Brice, for services commencing on April 1, 1979, the sum of $1,866.24 per month and to continue payment at such rate until the salary rate of the job she is actually performing shall exceed such rate, at which time her salary shall then be fixed by the regular salary rate.

7. Plaintiffs Louis Altheimer, Marshall Dailey, Gail Garrett, Charlotte Harris, Judy Week, Curtis Williams, Eugene Williams, and Floyd Williams each shall take nothing, and all claims of these defendants are dismissed on the merits.

8. The prevailing plaintiffs are awarded: (a) their costs, taxable under 28 U.S.C. § 1920, pursuant to Fed.R.Civ.P., Rule 54(d), and (b) a reasonable attorneys' fee, which is fixed, after due consideration of all circumstances, at $50,000.

9. The Court retains jurisdiction for the purpose of determining the nature and extent of the relief to be awarded to the class of female employees under the Remedial Order.

EXHIBIT 1

REMEDIAL ORDER RE THE CLASS OF FEMALE EMPLOYEES

The Court having considered the parties' suggestions as to the relief appropriate to the Class of Female Employees, and a hearing thereon having been held on February 16, 1979, this Court now makes this Remedial Order in accordance with its Findings of Fact and Conclusions of Law entered January 8, 1979.

Injunctive Relief

I. Owens-Illinois is hereby enjoined from discriminating against women on account of their sex by unduly limiting the hiring of women for management training positions or by unduly limiting the promotion of women to supervisory and management level jobs.

II. Owens-Illinois is hereby ordered to implement the procedures and standards set forth below.

A. Development of Job Descriptions and Employee Qualification Standards and Training Opportunities

(1) Within sixty (60) days of entry of judgment Owens-Illinois shall develop job descriptions for all supervisory/management positions at the Oakland plant.[1] Such job descriptions shall specify the duties and functions of, and the job-related qualifications necessary to perform, each salaried supervisory/management job, including the salary, duties, hours, supervisor, employees supervised, responsibility, working conditions, and, where applicable, special qualifications, skills,

strength, education, experience, prerequisite training, etc. Owens-Illinois shall revise these job descriptions whenever necessary to conform them to job-related changes with respect to efficient and safe performance of such job(s).

(2) Within ninety (90) days of entry of judgment Owens-Illinois shall perform a "skills inventory" questionnaire [in a format substantially similar to Exhibit A] at the Oakland plant to ascertain for all current and future hourly and salaried employees their individual level of education, prior work experience [with Owens-Illinois and other employers], and interest in "placement" in salaried jobs at the Oakland plant which become vacant in the future. The "skills inventory" shall be periodically updated as necessary. An employee may elect not to complete the

"skills inventory" questionnaire, but at any subsequent time such employee may request and complete a "skills inventory" questionnaire.

(3) Within sixty (60) days of entry of judgment Owens-Illinois shall notify all female employees of all current salaried supervisory/management training programs, including, where applicable, scheduled date(s) and the application procedure necessary to obtain consideration for enrollment.

B. Procedures for Selection of Employees to Fill Salaried Supervisory, Management, and Management Trainee Vacancies

(1) Owens-Illinois shall post conspicuously on one or more designated bulletin boards in the Oakland plant a JOB POSTING-NOTICE OF VACANCY (including, at

least, job title, duties, salary, and any special qualifications reasonably required, together with the legend "Both Female and Male Applicants Encouraged"), for each salaried supervisory, management and management trainee job vacancy position at the plant and shall make available upon request the description of and qualifications for such job as developed in accordance with Paragraph II.A(1) above. (The notice should, unless otherwise necessary, be posted at least eight working days before the job is filled.)

(2) Owens-Illinois shall accept from interested employees or other applicants written applications for such posted job vacancies in a form similar to Exhibit B for a period of at least five working days. (Owens-Illinois may, if necessary, fill the job on a temporary basis until the full selection procedure can be accomplished.)

(3) Selection of the employee or other applicant for all salaried supervisory/management and management trainee position vacancies except the top five positions at the plant shall be made by the following procedures:

(a) All applications will be considered;

(b) All employees will be considered who have the necessary qualifications as reflected in the "skills inventory";

(c) If there are no female applicants or candidates for any salaried supervisory/ management or management trainee vacancy, then Owens-Illinois shall solicit interest from qualified current Oakland plant female employees and/or from qualified females otherwise available.

(d) Owens-Illinois may also consider for any vacancy such qualified persons without regard to sex who may be otherwise available

from outside the Oakland plant, including persons presently employed by the Company at another facility or "new hires" from the Oakland plant recruiting area.

(e) From the candidates selected under the procedures contained in B(3)(a)-(d) above, the supervisor or management official with a requirement to fill any salaried supervisory/ management or management trainee vacancy will interview such candidates and thereafter will recommend in writing to the plant administrative manager the top three individual candidates deemed "best qualified", ranking them in order of selection choice with the reason(s) therefor.

(f) In making such recommendation, the supervisor or management official with a requirement to fill any salaried supervisory/ management or a management trainee vacancy shall consider the candidates' job qualifications,

disciplinary records attendance and medical records, length of service (but length of service or seniority is not required to be a controlling factor entitling any candidate to be selected), experience, education, prior training, job performance ratings, interest in the vacant position, and any other factor unique to the job vacancy. The factors which are determinative shall be reflected in writing in the recommendation made to the plant administrative manager.

(g) From the supervisor's or management official's recommendation and from the information available with respect to all other candidates based upon applications on file and the "skills inventory", the plant administrative manager shall select the "best qualified" person to fill the particular job vacancy.

(h) Those who file applications for the vacant job shall be notified promptly in writing who has been selected to fill the vacancy; and unsuccessful candidates, upon request, shall be advised of the reason(s) why they were not selected.

(i) All candidates not selected shall be offered counseling by the plant administrative manager and/or the supervisor or management official who was responsible for filling the vacant job as to how they should prepare for future vacancies in such job, such as specification of additional work, experience, education, training, or other such factors.

C. Record Keeping, Reporting, Dispute Resolution

(1) For a period of two years from the date of entry of judgment, Owens-Illinois

shall maintain written records of the foregoing standards and procedures, including copies of all job descriptions, skills inventory records, notices of educational and/or training opportunities, notices of salaried supervisory/management and management trainee position vacancies, applications for such vacancies, supervisor or management official recommendations, notices of filling of vacancies, and requests of unsuccessful applicants for reason(s) required by this Order. For this two-year period, Owens-Illinois shall semiannually file with the Court on August 31 and February 28 of each year a report reflecting the manner in which it has complied with this Order.

(2) In the event that any claim of sex discrimination arises with respect to the filling of any supervisory/management or management trainee vacancy under this Remedial Order

within two years from the date of entry of judgment which the job applicant desires to pursue to this Court, such claim shall be referred by this Court to a United States Magistrate for proposed findings of fact and recommendations for disposition pursuant to 28 U.S.C. § 636 and Local Rule 405.

Monetary Relief

I. Proceedings to determine whether back pay should be awarded to any individual member of the Class of Female Employees are referred to the Honorable Fred C. Woelflen, United States Magistrate, or if he is not available to such other Magistrate as the Chief Magistrate may designate.

II. On or before [a date 3 weeks after resolution of any post-trial motions], Owens-Illinois will give notice in substantially

the same form as Exhibit C to the Class of Female Employees by distributing to each class member currently employed at the Oakland plant a copy of that notice and Claim Form (Exhibit D) with her paycheck. Notice to class members no longer employed at Owens-Illinois shall be by first-class mail (addressee only return receipt requested) to the most recent address for which Owens-Illinois has record. Copies of the notice shall also be posted on bulletin boards at the Oakland plant used for communication with employees. An official of Owens-Illinois shall certify to the Court compliance with this paragraph.

III. On or before [a date 30 days after the notice date], each class member who wishes to make a claim for back pay shall return to the Court the Claim form (Exhibit D). No

back pay claims shall be considered unless the Claim form has been completed and returned to the Court by the specified date, or contains a postmark no later than the specified date.

IV. On or before [one week after return date], the Clerk shall make available for pick-up by counsel for each side copies of the Claim forms which have been submitted.

V. On or before [two weeks after pick-up of Claim forms], or at a later date convenient to the Magistrate's Calendar, a status conference shall be held before the Magistrate to which this matter has been referred. At the status conference the following matters, listed by way of illustration and not limitation, shall be discussed:

A. Procedures for determining individual back pay claims;

B. Hearing dates; and

C. Any other matters relevant to the conduct of the hearings.

The Magistrate shall file a written order setting forth the procedures to be followed in determining the validity of back pay claims.

VI. The Magistrate will handle these proceedings in accordance with the Federal Rules of Civil Procedure and Federal Rules of Evidence. At the conclusion of all of the back pay proceedings, the Magistrate shall submit to the Court his Findings of Fact and Recommendation for Disposition with respect to each claimant who has appeared at a hearing.

Special Defense in Proceedings Before Magistrate

In the proceedings before the Magistrate that are referred to in the Sections "Injunctive

Relief" (Paragraph II.C.(2)) and "Monetary Relief," the Magistrate is precluded from considering the merits of a claim if defendant shows that claimant, in connection with the claim, had, at the relevant times, an adequate remedy under a collective-bargaining agreement.

Jurisdiction

The Court retains jurisdiction until the four semi-annual reports required by Paragraph C(1) above have been filed with the Court for the purpose of assuring compliance with the provisions in this Order. The action will be dismissed thirty (30) days after the filing of the last such report, unless a party hereto shows good cause for the Court to retain jurisdiction further.

EXHIBIT A

SKILLS INVENTORY FORM

NAME: _____ DATE: _____

DEPARTMENT: _____ SHIFT: _____

Background and Skills

1. Education (Circle highest year completed)

Grammar School	1	2	3	4	5	6	7	8
High School	9	10	11	12				
College	1	2	3	4				

2. Are you presently enrolled in any educational or training programs?

   Yes _____ No _____

   If yes, describe course(s).

3. List the skills you presently have (for example, typing, shorthand, computer, engineering or other technical skills).

   _____

4. List skills you would like to learn.

   _____

5. List or describe any other special skill or ability which you believe supports your employment goals at Owens-Illinois.

_____

Work Experience

Describe any employment (outside Owens-Illinois) where you gained experience which supports your future goals.

_____

_____

_____

Areas of Interest

Consider each of the following areas of work and list the jobs in each area which are of most interest to you.

1. Administrative
   a. Industrial Engineering

_____

_____

   b. Accounting

_____

_____

   c. Purchasing

_____

_____

   d. Industrial Relations

_____

_____

e. Others

2. Manufacturing

a. Finished Products

b. Quality Assurance

c. Selecting

d. Corrugating

e. Others

3. Production

a. Forming

b. Apprentice Programs

c. Batch and Furnace

d. Mold Repair

e. Machine Repair

f. Others

EXHIBIT B

SALARIED JOB APPLICATION

JOB APPLIED FOR: _____

1. NAME: CLOCK #:

2. DATE OF HIRE WITH O-I:

3. CURRENT JOB AND SHIFT:

4. HAVE YOU READ THE JOB DESCRIPTION FOR THIS JOB? _____

5. DESCRIBE BRIEFLY ANY EDUCATION, TRAINING OR WORK EXPERIENCE WHICH YOU THINK QUALIFIES YOU FOR THIS POSITIION _____

Date:

_____
Signature

EXHIBIT C

LEGAL NOTICE

TO: All females who were employed at the Oakland Plant of Owens-Illinois, Inc. since March 23, 1974.

On March 15, 1979, the United States District Court for the Northern District of California determined that from March 23, 1974 until January 8, 1979 Owens-Illinois, Inc. ("Owens-Illinois"), at its Oakland Plant, discriminated against its female employees on account of their sex by unduly limiting the intitial hiring of women for management training positions and unduly limiting the promotion of women to supervisory and management level positions. You may have been affected by such discrimination.

Injunctive relief has been granted in the Remedial Order Re Class of Female Employees

which is enclosed with this Notice. You should carefully study the provisions of the Remedial Order, and you should seek explanation of its terms if you are uncertain of its effect on you or your job.

Court proceedings will be held to determine whether any of you are entitled to back pay. To be entitled to back pay you must show that but for Owens-Illinois, Inc.'s discrimination against you during the period from March 23, 1974 to January 8, 1979, in refusing you management training, or refusing you a promotion to a supervisory or management level position on account of your sex, you would have a better job, or have earned more money than you did, in fact, earn. To be entitled to back pay, you must show that with respect to some job vacancy.

(1) You applied for that vacancy

or

You would have applied for that job but you were deterred from applying because you believed a Company policy made your applying a useless act because you are a woman;

(2) You were qualified for the job;

(3) You did not receive the job; and

(4) The job was awarded to a male.

Owens-Illinois can rebut your claim of discrimination by showing that it did not award you the vacant job for non-discriminatory reasons, for example, because a more qualified applicant was available. If Owens-Illinois makes such a showing you must then prove that the reason Owens-Illinois gave for not selecting you was a mere pretext, that is, that it was not the true reason for denying you the job and that the true reason was because of your sex.

In order to present a claim for back pay you must complete the attached Claim form and return it to the address shown below by no later than [date 30 days from notice].

Floyd Williams, et al. v. Owens-Illinois, Inc.

Clerk, United States District Court
Federal Office Building
450 Golden Gate Avenue
San Francisco, CA 94102

If you do not return the Claim form, any claim to back pay which you may have as the result of discrimination on account of your sex by Owens-Illinois during the period March 23, 1974-January 8, 1979, will be waived, and when the final decree and judgment is entered in this case, you will be bound by that judgment whether or not you received a back pay award.

You are entitled to have any attorney represent you in these proceedings. You may choose to be represented by your own attorney. Other-

wise, the plaintiffs' attorneys will represent you if you wish them to do so. They are the firm of Withy, Gould, Miller & Gertsler, 2222 Grove Street, Berkeley, California 94704. You may consult these attorneys for information regarding this case or any claim you may have in connection with it.

EXHIBIT D

CLAIM

1. Name:
2. Social Security Number:
3. Owens-Illinois Identification Number:
4. Date first employed by Owens-Illinois:
5. If employment not continous,
   (a) list any break(s) in service:
   (b) list any re-employment dates:
6. List each specific job vacancy(ies) for which you believed yourself qualified:
7. List your qualifications for each such job vacancy:
8. For such job, list
   (a) when you believe you were qualified for that job:
   (b) the date when you applied or otherwise sought to be selected (If you did not apply, explain why):

(c) the result or response from Owens-Illinois:

(d) the name and sex of the person who was selected for that job, if you know:

(e) your supervisor at the time you applied for or sought the position:

9. If you are no longer employed by Owens-Illinois, list all jobs held since you left Owens-Illinois including:

(a) employer;

(b) employment dates;

(c) job title and description;

(d) pay (including all increases, fringe benefits and other compensation), and

(e) reason for leaving.

If you have not held a job since you left Owens-Illinois explain why not.

I declare under penalty of perjury that the above statements are true and correct.

Dated:

_____

Name

_____

Address

FOOTNOTES

1. The term "supervisory/management positions" as used herein shall be defined to include all management training positions, including but not limited to the position of student industrial engineer in the cost control department; all crew leaders and working foreman, union or non-union, who are responsible for supervising the work of one or more other persons, including but not limited to relief foremen and like foremen positions; and any other positions where the employee is responsible for supervising one or more employees in their work, but shall exclude the top five positions at the Oakland plant.

APPENDIX B

Floyd W. WILLIAMS, Jr., et al.,
Plaintiffs/Cross-Appellees,

Alice Brice,
Plaintiff/Appellant/Cross-Appellee,

Robert Harold and Aunita Jones, Plaintiff-Intervenors/Appellants/Cross-Appellees,

and

Charlotte Harris, et al.,
Plaintiff-Intervenors/Cross-Appellees,

v.

OWENS-ILLINOIS, INC.,
Defendant/Appellee/Cross-Appellant.

No. 79-4410.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted April 13, 1981.

Decided Jan. 11, 1982.

Employment discrimination action was brought alleging discrimination on basis of race and sex. The United States District Court for the Northern District of California, Robert H. Schnacke, J., 469 F.Supp. 70, entered judgment granting partial relief, and three of the plaintiffs appealed. The Court of Appeals, Canby, Circuit Judge, held that: (1) applicable period of limitations should have been calculated by subtracting 300 days from the date of initial complaint filed with the Equal Employment Opportunity Commission; (2) continuing violations doctrine was inapplicable to refusals to hire and terminations, but opportunity to prove continuing violations had to be provided as to claims of discriminatory placements or denials of promotions; (3) plaintiffs established a prima facie case of race discrimination if the relevant labor market was the one urged by plaintiffs or

some other market of equivalent or greater minority representation, and employer failed to rebut the statistical case presented by plaintiffs; (4) district court erred in determining that county rather than city was the relevant labor market on the basis of residence of current employees; (5) trial court did not abuse its discretion in refusing to consider prayer for $50 million in punitive and compensatory damages as incidental to class request for injunctive relief; (6) employer's evidence was not sufficient to rebut the statistical case of sex discrimination; (7) remedial order as to sex discrimination was not an abuse of discretion in failing to require employer to adopt any affirmative action guidelines; and (8) district court erred in precluding any claims for back pay which were subject to grievance proceedings under any union contract.

Affirmed in part, reversed in part, and remanded.

Appeal from the United States District Court for the Northern District of California.

Before TANG and CANBY, Circuit Judges, and WILLIAMS,* District Judge.

CANBY, Circuit Judge.

This action was brought by twelve named plaintiffs representing themselves and a class of current and former black and female emloyees of Owens-Illinois' Oakland glass container plant. They alleged that the company's employment and promotion practices violated Title VII, 42 U.S.C. § 2000e et seq., and 42 U.S.C. § 1981 and Executive Orders 11246 and 11375. In addition to their individual claims, appellants asserted class wide claims of discrimination by race or sex in hiring, initial job assignments, transfers and promotions. They also alleged discriminatory harassment and discharge. They sought injunctive relief, back pay and compensatory and punitive damages.

Following a lengthy trial, the jury found in favor of only three individual plaintiffs on their § 1981 claims. On issues tried to the court with the advice of the jury, the district court rejected the class race claims and found sex discrimination only with regard to initial hiring for management training positions and promotions into supervisory and managerial positions. 469 F.Supp. 70, 74, 77 (N.D.Cal. 1979). Appellants, the three individuals who prevailed below, limit their appeal to issues relating to the class actions. They assert numerous errors concerning pre-trial proceedings, the trial itself, the remedial order and the award of attorneys' fees.

I

The Oakland plant is located on the edge of Alameda County. During the 1971-78 period, it employed between 1600 and 2000

workers. Employees produce, pack and ship glass bottles, make the cartons in which the bottles are packed and administer the operation. "Selectors" inspect the glass and place acceptable bottles in cartons. "Lehr attendants" stack the filled cartons on pallets. The packed bottles are kept in the warehouse and eventually delivered by drivers working in the trucking department. The plant also has a maintenance department and a central mold shop, where molds are produced for use in a number of Owens-Illinois glass bottle plants.

The plant is organized into 20 departments which are grouped into five general areas (production, finished products, packaging and distributing, administration and other). Four of the departments, employing approximately 10% of the workers, are composed entirely of salaried employees. The remaining 16 departments employ hourly workers who belong to

various unions and whose wages, hours and terms of employment are controlled by collective bargaining agreements.

Seven named plaintiffs filed suit on behalf of themselves and similarly situated blacks and women in June 1975. They alleged that Owens-Illinois had discriminated against them in violation of Title VII, 42 U.S.C. § 1981 and Executive Orders 11246 and 11375. Five additional plaintiffs subsequently intervened. Shortly before trial, the court certified two classes; blacks employed at the plant after March 7, 1971 and women employed there after March 23, 1974. The court ruled that any earlier claims were time-barred. It further ruled that because the unions were not parties to the suit, any actions by Owens-Illinois which were undertaken in compliance with independently entered collective bargaining agreements would not provide the basis for

any claim of discrimination. The trial court granted summary judgment to Owens-Illinois on appellants' executive order claims. Appellants do not challenge this last ruling on appeal. The court left for trial individual and class race claims which were based on 42 U.S.C. § 1981 and Title VII as well as individual and class sex discrimination claims brought pursuant to Title VII.

The § 1981 individual claims were tried to a jury which also considered the class claims in an advisory capacity. The trial court rejected appellants' contention that the jury be permitted to determine compensatory and punitive class damages pursuant to § 1981. The Court held that because the class was certified under Federal Rule of Civil Procedure 23(b)(2), recovery was limited to equitable relief. The court consequently struck the prayer for compensatory and punitive class relief.

The jury found against seven of the eleven named plaintiffs.[1] It found in favor of three plaintiffs and disagreed as to one. In its advisory capacity the jury split six to three in the company's favor on the issue of black class liability and found discrimination against women only in promotions to management positions and placement in supervisory and management training jobs. The trial court entered judgment in accordance with the jury's verdict on the individual claims and the jury's recommendations on the class actions.

The court entered a remedial order requiring the company to implement new policies for the promotion of women to supervisory and management positions. The court rejected, however, appellants' request for specific affirmative action goals. The court ordered that all back pay claims of the female class be heard by a magistrate, but directed that

the magistrate deny relief to any class member whose claim could have been addressed through the grievance procedure established by the collective bargaining agreements.

The court also rejected appellants' request for approximately $650,000 in attorneys' fees. It awarded $50,000, which it concluded was more than adequate compensation.

II

Pre-trial Rulings: Continuing violations

[1-3] In a class action, a class representative's EEOC complaint tolls the statute of limitations for all class members. Inda v. United Air Lines, Inc., 565 F.2d 554, 559 (9th Cir. 1977), cert. denied, 435 U.S. 1007, 98 S.Ct. 1877, 56 L.Ed. (1978). The trial court established the limitations period for the two classes by subtracting the 180 day statute of limitations for filing with the

EEOC from the date of the first EEOC complaint filed by a member of each class. The court therefore concluded that claims of sex discrimination based on acts prior to March 1974 and of race discrimination based on acts prior to March 1971 were time-barred.[2] The court rejected the continuing violation doctrine as inapplicable.

[4, 5] The doctrine of continuing violations, as one court observed, is "actually a conglomeration of several different ideas." Elliott v. Sperry Rand Corp., 79 F.R.D. 580, 585 (D.Minn.1978). For present purposes, however, the relevant strain of continuing violation doctrine is that a systematic policy of discrimination is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period. Id. at 585-86. The reason is that the contin-

uing system of discrimination operates against the employee and violates his or her rights up to a point in time that falls within the applicable limitations period. Such continuing violations are most likely to occur in the matter of placements or promotions. A minority employee who is not promoted in 1973, for example, and is subject to a continuing policy against promotion of minorities, may then file a timely charge in 1976, because the policy against promoting him or her continued to violate the employee's rights up to the time the charge was filed. With regard to such discrimination in promotion, this court has accepted the following formulation:

> [A] challenge to systematic discrimination is always timely if brought by a present employee, for the existence of the system deters the employee from seeking his full employment rights or threatens to adversely affect him in the future.

Reed v. Lockheed Aircraft Corp., 613 F.2d 757, 761 (9th Cir. 1980), quoting Elliott v.

Sperry Rand Corp., 79 F.R.D. at 586; accord, Higgins v. Oklahoma ex rel. Oklahoma Employment Security Comm'n, 642 F.2d 1199, 1200 n.2 (10th Cir. 1981); Clark v. Olinkraft Inc., 556 F.2d 1219, 1221-22 (5th Cir. 1977), cert. denied, 434 U.S. 1069, 98 S.Ct. 1251, 55 L.Ed.2d 772 (1978); Rich v. Martin Marietta Corp., 522 F.2d 333, 348 & n.15 (10th Cir. 1975); Wetzel v. Liberty Mutual Life Ins. Co., 508 F.2d 239, 246 (3d Cir.), cert. denied, 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 679 (1975).

The situation may be different, however, with regard to complainants who have ceased to be employees or never were employees. A refusal to hire or a decision to fire an employee may place the victim out of reach of any further effect of company policy, so that such a complainant must file a charge within the requisite time period afer the refusal to hire or termination, or be time-barred. If in those cases

the victims can show no way in which the company policy had an impact on them within the limitations period, the continuing violation doctrine is of no assistance or applicability, because mere "continuing impact from past violations is not actionable. Continuing violations are." Reed v. Lockheed Aircraft Corp., 613 F.2d at 760; see United Air Lines, Inc. v. Evans, 431 U.S. 553, 558, 97 S.Ct. 1885, 1889, 52 L.Ed.2d 571 (1977).

[6] We agree with the trial court that in this case Owens-Illinois' refusals to hire and terminations did not give occasion to apply the continuing violations doctrine. Claims based on discriminatory refusals to hire or on terminations occurring before the limitations period were therefore properly excluded.

The trial court erred, however, in concluding that the continuing violations

doctrine did not apply to discriminatory placements or denials of promotions. It should not have barred consideration of such events that may have occurred prior to the limitations period. The reason is that appellants were entitled to base claims on such discriminatory acts if they could show that these acts continued as violations because the supporting discriminatory policy carried forward into the limitations period and had its effect on employees. This opportunity to prove a continuing violation must be provided, of course, whether the claim is race or gender discrimination. Jenkins v. Home Insurance Co., 635 F.2d 310, 312 (4th Cir. 1980).

[7] For reasons set forth below, remand of both the black class claims and most of the womens' class claims is necessary. On remand, evidence of discriminatory acts relating to placement or promotion of blacks and women

occurring before the applicable limitations period may be admitted for the purpose of attempting to show continuing violations having an effect on the concerned employees within the limitations period.[3]

III

Race Claims

Appellants asserted race claims pursuant to both Title VII and 42 U.S.C. § 1981. They contend that they presented sufficient evidence to support a prima facie case.

A. Title VII

1. Prima Facie Case

[8-10] The trial court properly discounted much of appellants' statistical evidence as unhelpful.[4] We conclude, however, that appellants presented sufficient evidence to establish a prima facie case of discrimination if the

relevant labor market is one of those urged by appellants or is some other market of equivalent or greater minority representation. (See subdivision 2, following).

Appellants' statistical study representing the job classification of 88% of all persons hired between 1971 and 1976 is instructive. That study showed that although blacks comprised 27% of the new hires most of the blacks hired were service workers. Another meaningful statistic was provided by Owens-Illinois. During the period April 1974 through April 1975, only 11% of the craftsmen hired were black.

We believe that Owens-Illinois failed to rebut the statistical case presented by appellants. While the company did offer alternative studies, these did not negate the probative value of appellants' statistics. Indeed, Owens-Illinois' own study suggested that the

percentage of blacks hired in craft positions was extremely low.

The company's primary defense was that many of its wage rates and promotion practices were mandated by collective bargaining agreements. In addition, Owens-Illinois claimed that several contracts eliminated its discretion in hiring by requiring the company to accept all employees referred by union hiring halls. The trial court ruled that any actions which the company undertook pursuant to union contracts would be deemed non-discriminatory, apparently because appellants had not brought the unions in as defendants. This ruling was erroneous as a matter of law.

[11, 12] An employer-union agreement permitting the employer to discriminate is not immune to race discrimination claims. "Rights established under Title VII ... are 'not rights which can be bargained away -

either by a union, by an employeer, or by both acting in concert.'" Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 447 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086, 98 S.Ct. 1281, 55 L.Ed.2d 792 (1977), quoting Robinson v. Lorillard Corp., 444 F.2d 791, 799 (4th Cir.), cert. dismissed, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971). "[U]nion pressure on an employer does not relieve the latter of its obligation to respect an applicant's Title VII rights ...." Grant v. Bethlehem Steel Corp., 635 F.2d 1007, 1016 (2d Cir. 1980), cert. denied, ____ U.S. _____, 101 S.Ct. 3083, 69 L.Ed.2d 954 (1981).[5]

The low percentage of blacks employed in certain areas of the plant suggests possible discrimination. Whether the studies in evidence establish a prima facie case, however, can be conclusively determined only by correlating these statistics with the corresponding percen-

tage of blacks in the relevant geographic labor market. Unfortunately, for reasons to be stated now, the correlation between the Owens-Illinois work force and the relevant labor market can only be made upon remand.

2. Relevant Labor Market

Appellants contend that the relevant market was either the population of Oakland or its labor force. In 1970, blacks comprised 40% of the Oakland population and 30% of the labor force. Owens-Illinois argues that the labor force of Alameda County was the relevant market. For the years 1973-78 blacks comprised only 13.6% of the Alameda County labor force. It is apparent, therefore, that whether or not a prima facie case of discriminatory impact was established is wholly dependent on whether Oakland is selected as the relevant labor market.

[13] The trial court determined that Alameda County was the relevant market and

accordingly appears to have held that appellants' statistics did not establish a prima facie case.[6] The court relied in large degree upon "zip code" data submitted by Owens-Illinois showing that its employees resided throughout Alameda County. Less than 50% of its new hires and only 34% of its total employees lived in Oakland. We conclude that the district court erred in selecting Alameda County as the relevant market on the basis of these date.

The zip code data, relied upon by the district court, do not prove that the Owens-Illinois' hiring practices were non-discriminatory. The data do indicate the geographic area from whch the company hired its employees; they are not probative of whether Owens-Illinois actually hired its employees in non-discriminatory fashion from the available pool of labor. Indeed, the post hoc approach accepted by the

trial court would permit an employer to limit the number of blacks employed by drawing his employees from predominantly white areas within commuting distance. See Markey v. Tenneco Oil Co., 635 F.2d 497, 499-500 (5th Cir. 1980). Because the district judge may have premised his conclusion that Owens-Illinois did not engage in discriminatory practices on this improper market determination, we reverse and remand the claims of the black class.[7]

We do not automatically accept, however, appellants' reasoning in support of their view that the relevant market is either the Oakland population or its labor force. These market definitions were initially adopted to determine whether Owens-Illinois was in compliance with the affirmative action goals of Executive Order 11246 and 11375 and could therefore be awarded a government contract.[8]

While other factors may ultimately be found that will lead to selection of the Oakland

population or labor force as the relevant market, we are reluctant to adopt a market definition solely on the ground that Owens-Illinois was willing to accept it in order to qualify for government contracts. We fear that such an approach would have a chilling effect on contract compliance and affirmative action. It is possible that Owens-Illinois would not have acceded to the government's definition had it been aware that an attendant consequence of its acquiescence would be to bind it to a particular definition of the market in subsequent non-related litigation.

[14] On remand, it will be open for the trial court to determine the appropriate definition of relevant market, so long as that determination is not simply based on actual past hiring or Owens-Illinois' acceptance of a given definition for purposes of Executive Orders 11246 and 11375. One poten-

tially more accurate indicator of the relevant market would be actual applicant (as opposed to hired worker) flow, at least where there is no evidence of systematic discouragement of minority applicants. See Dothard v. Rawlinson, 433 U.S. 321, 330, 97 S.Ct. 2720, 2727, 53 L.Ed.2d 786 (1977). These data would readily indicate what percentage of Owens-Illinois' applicants come from Oakland as opposed to other areas. See Hazelwood School District v. United States, 433 U.S. 299, 308, 97 S.Ct. 2736, 2741, 53 L.Ed.2d 768 n.13; Phillips v. Joint Legislative Committee, 637 F.2d 1014, 1025 (5th Cir. 1981); United States v. County of Fairfax, 629 F.2d 932, 940 (4th Cir. 1980), cert. denied, 449 U.S. 1078, 101 S.Ct. 858, 66 L.Ed.2d 801 (1981).

If these data are unavailable, the district court may accept any other reasonable proxy which indicates the source of Owens-

Illinois' potential employees. One such proxy would be applicant data for a period subsequent to the one covered by this litigation. Cf. Heagney v. University of Washington, 642 F.2d 1157, 1165 (9th Cir. 1981) study measuring conditions 22 months after appellant was employed and therefore admissible.) Unless the parties can show otherwise, we see no reason to assume that the source of Owens-Illinois' applicant pool has radically changed over time.

B. § 1981 Claims

1. Intent

[15] Appellants and amicus Mexican American Legal Defense and Education Fund (MALDEF) assert that the trial court erred in ruling that employment discrimination claims brought pursuant to § 1981 require proof of intent. Although an open question when the parties filed their initial briefs, see Davis

v. County of Los Angeles, 566 F.2d 1334, 1340 (9th Cir. 1977), vacated as moot, 440 U.S. 625, 634, 99 S.Ct. 1379, 1384, 59 L.Ed.2d 642 (1979), this issue has been definitively determined by two recent decisions of this court. Craig v. County of Los Angeles, 626 F.2d. 659, 668 (9th Cir. 1980), cert. denied, 450 U.S. 919, 101 S.Ct. 1364, 67 L.Ed.2d 345 (1981) and Golden v. Local 55, International Association of Firefighters, 633 F.2d 817, 823 (9th Cir. 1980), clearly establish that proof of intent is required.

2. Jury Trial

[16, 17] Section 1981 provides both legal and equitable remedies. Johnson v. Railway Express Agency, 421 U.S. 454, 460, 95 S.Ct. 1716, 1720, 44 L.Ed.2d 295 (1975). The legal remedies include compensatory and punitive damages. See Claiborne v. Illinois Central Railroad, 583 F.2d 143, 154 (5th Cir.

1978), cert. denied, 442 U.S. 934, 99 S.Ct. 2869, 61 L.Ed.2d 303 (1979); Sethy v. Alameda County Water District, 545 F.2d 1157 (9th Cir. 1976) (en banc). Accompanying these legal remedies is the right to trial before a jury. Setser v. Novack Investment Co., 638 F.2d 1137 (8th Cir. 1981); Moore v. Sun Oil of Pennsylvania, 636 F.2d 154 (6th Cir. 1980); cf. Shah v. Mt. Zion Hospital & Medical Center, 642 F.2d 268, 272 (9th Cir. 1981).

As part of their § 1981 claim, appellants sought both compensatory and punitive damages for the class of black employees. The trial court certified the class under Federal Rules of Civil Procedure 23(b)(2) and, while permitting a jury trial of individual damage claims, limited the class remedy solely to injunctive relief.[9] Appellants contend that their prayer for punitive and compensatory damages as a class was incidental to the request for injunc-

tive class relief and therefore should have been permitted. Appellants further contend that they were entitled to a jury trial on their § 1981 claims, including their prayer for compensatory and punitive class relief. We disagree with both contentions.

[18] It is true that this court has adopted the view that legal remedies which are incidental to a request for injunctive relief may be included as a part of the (b)(2) claim. Society for Individual Rights, Inc. v. Hampton, 528 F.2d 905, 906 (9th Cir. 1975); Elliot v. Weinberger, 564 F.2d 1219, 1228 (9th Cir. 1977); see Proposed Rules of Civil Procedure, Advisory Committee's Note to proposed Rule 23, 39 F.R.D. 98, 102 (1966) ((b)(2) designation not appropriate where "final relief relates exclusively or predominantly to money damages." (emphasis supplied)); 7A Wright & Miller Federal Practice and Procedure § 1775, at 22-23 (1972).

It appears here, however, that the claimed compensatory damages were not necessarily compatible with class injunctive relief. Unlike back pay, compensatory damages are not subsumed by the traditional equitable concepts of reinstatement and restitution. More importantly, establishing the amount of compensatory damages due each plaintiff is a far more complex and uncertain exercise than the determination of back pay, and greatly complicates the management of the class action. "[I]t is within the discretion of the trial judge, under Rule 23(c)(4), to limit the issues in a class action to 'those parts of a lawsuit which lend themselves to convenient use of the class action motif.'" Society for Individual Rights, Inc. v. Hampton, 528 F.2d at 906, quoting Nix v. Grand Lodge, IAM, 479 F.2d 382, 385 (5th Cir.), cert. denied, 414 U.S. 1024, 94 S.Ct. 449, 38 L.Ed.2d 316 (1973). In this instance we do not believe

that the trial court abused its discretion in refusing to consider appellants' prayer for $50 million in punitive and compensatory damages as incidental to the request for injunctive relief.

[19] Thus, the only requested remedy other than injunctive relief which was before the court was back pay. That relief, however, was properly viewed as either equitable or as a legal remedy incidental to an equitable cause of action[10] and accordingly not sufficient to create a right to jury trial. See Moore v. Sun Oil Co., 636 F.2d 154, 156-57 (6th Cir. 1980); Slack v. Havens, 522 F.2d at 1094 & n.4; Lynch v. Pan American World Airways, Inc., 475 F.2d 764, 765 (5th Cir. 1973); Robinson v. Lorillard Corp., 444 F.2d at 802. But see Setser v. Novack Investment Co., 638 F.2d 1137, 1142 (8th Cir. 1981).

IV

A. Female Class Prima Facie Case

Appellants' sex discrimination suit was predicated solely on Title VII. Cf. Runyon v. McCreary, 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976) (§ 1981 not applicable to gender discrimination). All claims were therefore tried to the court. Under the Act the standard for proving sex discrimination and race discrimination is the same. See White v. City of San Diego, 605 F.2d 455, 458-59 (9th Cir. 1979). Appellants sought to establish a prima facie case of sex discrimination by introducing evidence of statistical disparity and augmenting the statistics with documents and testimony.

[20] Appellants' statistical studies indicated that although women comprised more than 30% of the Oakland plant work force, they were systematically excluded from many

job categories. No women were employed as machine repairers, mold repairers or teamsters. Women were concentrated in three departments: janitorial, accounting and finished products. Women comprised only 4% of the officials and managers and 4% of the craft workers but were 48% of the operatives and 67% of the office and clerical workers. These statistics were demonstrably disproportionate when compared with the relevant labor market which Owens-Illinois had accepted for purposes of compliance with contracts of the Energy Research and Development Adminstration.[11] Women constituted 38% of the managers and professionals in the combined Oakland-Alameda County labor market and 40% of the Oakland work force which Owens-Illinois had agreed was its source for all other categories.

Of the new hires between 1971 and 1976, 37.2% were women. No women were hired, however,

as "journeymen,"[12] teamsters or lehr attendants. Appellants also introduced evidence showing that as late as 1974 some departments were still designating by gender their requests for applicants and that particular individuals were denied promotions and harrassed because of their sex.

Appellants offered two studies showing that women at the Oakland plant earned significantly less than men. Dr. Peele compared earnings between males and females. He found that male hourly employees, on the average, earned 63% more than women in 1973. This disparity was 61% in 1976. Dr. Drogin compared base salary rates for hourly employees and concluded that women earned approximately $2650 less per year.

Owens-Illinois' rebuttal of sex discrimination claim closely paralleled its response to the race claims. It attacked the reliability

of the statistical studies and introduced other studies to support its view. It also showed that most the initial hiring was controlled by union hiring halls and that well over 80% of all promotions were subject to procedures in contracts between Owens-Illinois and particular unions. For reasons similar to those already explained in regard to the black class claims, we do not regard the evidence sufficient to rebut appellants' statistical case.

The company also challenged the non-statistical evidence. Although it acknowledged that women were generally not employed as lehr attendants, it presented evidence that it had encouraged women to apply for the position but that few women had chosen to do so. It further showed that during a reduction in work force, senior women selectors who could have remained on the job by exercising their

labor agreement seniority rights to displace junior male lehr attendants, uniformly preferred unemployment.

The company conceded that at one time there were discriminatory placements. These placements may have accounted for an initial disparity between men and women, but the company argued that these practices were not actionable because they occurred prior to March 23, 1974, the cutoff date set by the trial court. Moreover, Owens-Illinois contended that although the initial placements may have been discriminatory, women had an equal opportunity for promotion under the applicable labor agreements.

The trial judge concluded that appellants failed to prove sex discrimination in earnings and non-supervisory and management promotions. The court did not state, however, whether plaintiff had proved a prima facie case of sex discrimination for anything more than supervisory and management promotions.

We have already held that the trial court erred in defining the relevant labor market, refusing to consider the continuing violations doctrine for promotions or placements occurring prior to the applicable limitations period, and in deeming non-discriminatory any action taken pursuant to a collective bargaining contract. Accordingly, we remand those parts of the women's class claims that relate to possible discrimination in: (1) hirings occurring within 300 days[13] prior to the filing of the first women's charge with the EEOC; (2) placements or promotions to non-professional and non-managerial positions occurring within the same period or earlier in the case of continuing violations; (3) promotions to professional and managerial positions occurring prior to the limitations period if they are continuing violations. Redetermination of the relevant market will

permit assessment of appellants' prima facie case. If a prima facie case is established, adherence to collective bargaining agreements will not suffice as a rebuttal.

B. Remedial Order

[21] The trial court's remedial order directs Owens-Illinois to (1) compile job descriptions for all supervisory and management positions at the Oakland plant; (2) permit all employees to complete a skill inventory form indicating their skills and areas of interest for promotion; (3) notify all female employees of current training programs for supervisory or management positions; (4) conspicuously post in one or more areas notices for each salaried supervisory, management and management trainee vacancy and include in the notice of vacancy the legend "Both female and male applicants encouraged" and (5) establish

nondiscriminatory procedures for filling these vacancies. The company must (a) consider all applicants whose skills inventory forms show them to be qualified; (b) if there are no women applicants, solicit female applicants from qualified Oakland plant employees and/or from qualified females otherwise available; (c) choose the "best qualified" person according to a list of objective and subjective criteria;[14] (d) maintain records explaining why a participant was not selected for a particular position and (e) promptly notify in writing all applicants that the position has been filled and inform unsuccessful applicants upon request of the reason they were not selected.

The remedial order referred all claims for monetary relief to a United States Magistrate. The Magistrate was to provide back pay hearings for all women who claimed to have been discriminated against subsequent to March 23, 1974,

in that they did not receive a supervisory or management position. The trial judge ruled that the Magistrate could not consider the merits of any claim which, at the relevant time of the violation, had an adequate remedy under a collective bargaining agreement.

Appellants contend that the remedial order is critically deficient in two aspects: (1) the order does not require Owens-Illinois to adopt any affirmative action guidelines; (2) it severely restricts the number of women entitled to relief by disqualifying claimants who had a remedy under a collective bargaining agreement.

1. Affirmative Action

The primary objective of Title VII is prophylactic: to achieve equal employment opportunity and remove discriminatory barriers which have operated to favor white male employees

over others. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417, 95 S.Ct. 2362, 2371, 45 L.Ed.2d 280 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 429-30, 91 S.Ct. 849, 852-53, 28 L.Ed.2d 158 (1971). Towards this end, Congress has granted broad equitable powers to enable the courts to fashion the most complete relief possible. The district courts have "'not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.'" Albemarle Paper Co. v. Moody, 422 U.S. at 418, 95 S.Ct. at 2371, quoting, Louisiana v. United States, 380 U.S. 145, 154, 85 S.Ct. 817, 822, 13 L.Ed.2d 709 (1965).

[22, 23] The particular remedy granted, however, is not limited to any specific or prescribed form; rather it is left largely to the broad discretion of the district court.

Davis v. County of Los Angeles, 566 F.2d at 1342; Rios v. Enterprise Association Steamfitters Local 638, 501 F.2d 622, 631 (2d Cir. 1974). We conclude that the trial court's remedial order was not an abuse of discretion.

Although the court's order does not give appellants everything they sought, it does eradicate the subjective criteria which permitted discriminatory promotions and it also places an affirmative duty on Owens-Illinois to seek women for its management and supervisory positions.

Firefighters Institute for Racial Equality v. City of St. Louis, 588 F.2d 235 (8th Cir. 1978), cert. denied, 443 U.S. 904, 99 S.Ct. 3096, 61 L.Ed.2d 872 (1979), cited by appellants to support its contention that the court of appeals should unilaterally order more affirmative measures such as preferential hiring or quotas, is distinguishable. In Firefighters, the

Eighth Circuit concluded that the city was doing everything in its power to maintain its discriminatory policy and delay implementation of the trial court's decree. 588 F.2d at 240. The court of appeals therefore concluded that the only way to end this discrimination was by such affirmative measures. In this case, however, there has been no indication of non-compliance. It was not an abuse of discretion for the trial judge to conclude that preferential hiring or a quota system was unnecessary.

2. Grievance proceedings

[24] The district court also precluded any claims for back pay which were subject to grievance proceedings under any union contract. Appellants contend that this ruling improperly restricts class members' right to recover. We agree.

[25] Title VII is silent on the need to exhaust contractual remedies or the effect of invoking union grievance procedures. Oubichon v. North American Rockwell Corp., 482 F.2d 569, 572 (9th Cir. 1973). Courts have stated, however, that Congress intended Title VII to be a separate and distinct mode of recovery. A Title VII plaintiff will therefore not be denied relief if he or she initiates a grievance proceeding prior to bringing a civil rights suit. Alexander v. Gardner-Denver Co., 415 U.S. 36, 59-60, 94 S.Ct. 1011, 1024-25, 39 L.Ed.2d 147 (1974); Oubichon, 482 F.2d at 572 This same policy argues strongly in favor of permitting a Title VII claimant to recover even if he or she failed to exhaust contractual remedies.

Owens-Illinois asserts that this issue is moot. Following the entry of the remedial order, Owens-Illinios circulated notices to

women employed at the plant since March 23, 1974 advising them to file claims if they believed that they were discriminated against with respect to any promotion into any management or supervisory position including hourly supervisory positions covered by collective bargaining agreements. All resulting back pay claims were settled prior to the scheduled hearing before the Magistrate. The Magistrate therefore never determined whether any claim was subject to a union grievance procedure and therefore precluded by the court's remedial order.

While we agree that any claims which were settled are moot, we recognize that in further proceedings the trial court may discover additional women who are entitled to relief. Accordingly, we vacate that part of the remedial order which precludes claims which were subject to grievance procedures.

V

A. Discovery

The trial judge specified in his pretrial order that appellants could not discover Owens-Illinois computer tapes. He required the company to process whatever computer runs appellants requested but did not order Owens-Illinois to turn over physical possession of the tapes. The judge also allowed the possibility of further discovery if appellants could show good cause. Appellants contend that this order did not permit them adequate discovery and therefore resulted in a statistical case "prepared for them by [the] defendants." Appellants therefore request that on remand they be permitted to discover these tapes. We decline to impose such a limit on the trial court's discretion.

[26, 27] While it is true that computer tapes are not per se non-discoverable, Dunn

v. Midwestern Indemnity, 88 F.R.D. 191, 194 (S.D. Ohio 1980), cf. Manual for Complex Litigation, 1 Pt. 2 J. Moore Federal Practice, Pt. 1 § 2.715 at 129 (2d Ed. 1980) ("[d]iscovery requests relating to the computer, its programs, inputs and outputs should be processed under methods consistent with the approach taken to discovery of other types of information"), the facts here do not compel the granting of appellants request. All information contained on the computer tapes was included in the wage cards which appellants discovered. R.T. 6645-59. Appellants were therefore not deprived of any data. While using the cards may be more time consuming, difficult and expensive, these reasons, of themselves, do not show that the trial judge abused his discretion in denying appellants the tapes.

VI

Appellants have attacked the trial court's award of attorneys' fees to them as being too low. Because that award may have been in part on the outcome of the case, our reversal requires that we also vacate the award. A new award will take into account the fact that appellants largely prevailed on appeal, and will of course reflect services rendered in further proceedings. The amount ultimately award by the district court should be explained and justified according to the factors set forth in Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975), cert. denied sub nom. Perkins v. Screen Extras Guild, Inc., 425 U.S. 951, 96 S.Ct. 1726, 48 L.Ed.2d 195 (1976). See also Sethy v. Alameda County Water District, 602 F.2d 894 (9th Cir. 1979), cert. denied, 444 U.S. 1046, 100 S.Ct. 734, 62 L.Ed.2d 731 (1980).

VII

To summarize:

The black class claims are remanded for further proceedings. It will there be necessary to redefine the relevant labor market for the purpose of determing the existence of disparate impact. Evidence of racial discrimination in placements and promotions occurring prior to the limitations period may be admitted for the purpose of determining the existence of violations supported by a policy with a continuing effect. Claims for any employment discrimination, discrete or continuing, occurring within 300 days before the initial charge filed with the EEOC or extending into that period will not be barred by limitations.

The prospective relief ordered by the district court for gender discrimination in promotion to supervisory or management positions is affirmed as modified. Remand is ordered,

however, to permit women so discriminated against to establish back pay claims for discrimination occurring within 300 days before the initial charge to the EEOC, whether or not union grievance procedures were exhausted.

The remaining womens' class claims are remanded for further proceedings. As already indicated, the relevant market must be redefined. Evidence of gender discrimination in placement or promotion to non-managerial or non-supervisory positions antedating the limitations period may be admitted for the purpose of determining the existence of violations supported by a policy with a continuing effect. Claims for discrimination, discrete or continuing, occurring within 300 days of the initial charge to the EEOC or extending into that period are not barred by limitations. Failure to invoke grievance procedures will not defeat an otherwise viable claim.

With regard to both the black class and womens' class claims, the fact that discrimination, if established, was compelled by the provisions of a collective bargaining contract will not be a defense.

Affirmed in part, reversed in part and remanded.

FOOTNOTES

*The Honorable David Williams, United States District Judge, for the District of Central California, sitting by designation.

1. One plaintiff's claims were dismissed prior to trial.

2. Appellants also contend that the trial court erred in calculating the applicable statute of limitations. The court established the applicable period by subtracting 180 days from the date of the initial complaint filed with the EEOC. The court refused to apply the 300 day limit available in states which have a qualified compliance agency because there was no evidence that appellants had ever filed with the state. Appellants assert that filing with the state was not a prerequisite for extending the limitations period. We conclude that the trial court should have applied the 300 day limit.

42 U.S.C. § 2000e-5(c) provides that when there is a qualified state agency, a complaint must first be filed there. The statute also provides that the limitations period for filing with the EEOC is extended from 180 to 300 days when the aggrieved party has initiated a complaint with a qualified state agency. Id. § 2000e-5(e). The Supreme Court has held that the statute is satisfied when the Commission refers the complaint to the state agency on behalf of the person aggrieved. Love v. Pullman Co., 404 U.S. 522, 525, 92 S.Ct. 616, 618, 30 L.Ed.2d 679 (1972). Moreover, the EEOC has imposed upon itself the duty of making such a referral in every case where there is a qualified state agency. 29 C.F.R. § 1601.13 (1980) as revised by 46 Fed.Reg. 43,040 (1981). This court has held that a complainant is not charged with the failure of the EEOC to fulfill procedural requirements

imposed upon it by statute. Watson v. Gulf & Western Industries, 650 F.2d 990, 992-93 (9th Cir. 1981). The same principle relieves the complainant from the consequences of a failure of the EEOC to follow the procedures it has imposed upon itself. Cf. Ramirez v. National Distillers & Chemical Corp., 586 F.2d 1315, 1320 (9th Cir. 1978). Filing a complaint with the EEOC placed the Commission under a duty to refer the complaint to the California compliance agency. The complainant is not to be prejudiced by the EEOC's failure to fulfill its duty. Roberts v. Arizona Board of Regents, 661 F.2d 796 at 799 (9th Cir. 1981). This conclusion does not automatically invoke the 300 day limit, however. The statute further provides that no charge may be filed with the EEOC until the expiration of 60 days after proceedings have been commenced with the state agency. 42 U.S.C. §2000e-5(c). The Supreme

Court held in Mohasco Corp. v. Silver, 447 U.S. 807, 100 S.Ct. 2486, 65 L.Ed.2d 532 (1980), that the effect of this provision is to render untimely any charge originally filed with the EEOC more than 240 days after the act complained of, unless the state agency actually disposes of the referred charge before a total of 300 days has elapsed. Id. at 814 n.16.

This court has ruled, however, that the Mohasco rule is not to be applied retroactively, and that the 300 day limit applies to charges filed with the EEOC in deferral states on or before June 23, 1980. Wiltshire v. Standard Oil Co. of California, 652 F.2d 837, 842 (9th Cir. 1981). Charges in the present case are therefore subject to the 300 day limit.

3. We emphasize that a continuing violation exists only if Owens-Illinois' promotion policy was discriminatory and continued in effect

into the permissible limitations period. A continuing violation should be distinguished from the continuing impact of a past, yet discrete and no longer existent discriminatory act. The fact that some employees were harmed by the continuing impact of Owens-Illinois' discrete incidents of prior discrimination that occurred before the limitations period is not sufficient. Compare United Air Lines Inc. v. Evans, 431 U.S. 553, 558, 97 S.Ct. 1885, 1889, 52 L.Ed.2d 571 (1977) (continuing impact of past violation not actionable) with Reed v. Lockheed Aircraft Corp., 613 F.2d 757, 760 (mere continuing impact must be distinguished from continuing violations; continuing violations are actionable, continuing impact from a past violation is not).

4. Appellants introduced two statistical studies which classified employees by race. These studies indicated that few blacks were

employed as managers or craftsman and that the majority of blacks worked as service workers (janitors and matrons) and laborers. The district court properly discounted these studies because they failed to excluded employees hired prior to July 2, 1965, the effective date of Title VII for private employers. The Supreme Court has stated that an employer who after the effective date of the Act makes all employment decisions in a non-dicriminatory manner "would not violate Title VII even if it had formerly maintained an all-white work force by purposefully excluding Negroes." Hazelwood School District v. United States, 433 U.S. 299, 309, 97 S.Ct. 2736, 2742, 53 L.Ed.2d 768 (1977) (footnote omitted). "To include pre-Act hires in the statistical analysis in this case would improperly weigh the evidence and would tend to show present discrimination by an employer if it had dis-

criminated prior to the effective date of the Act but had not discriminated after the Act took effect." EEOC v. United Virginia Bank, 615 F.2d 147, 150 (4th Cir. 1980); see Movement for Opportunity and Equality v. General Motors Corp., 622 F.2d 1235, 1245 (7th Cir. 1980).

Appellants also introduced studies showing statistical disparity in terminations. This study indicated that 20% of white employees who left the Oakland plant were fired while the corresponding figure for blacks was 48%. The district court properly concluded that this study was also invalid. On cross-examination, one of appellants statistical experts conceded that although he developed the study, he did not know what Owens-Illinois classified as "termination for cause."

We express no opinion as to appellants' two wage and pay studies. Appellants' statistics indicated that black workers earned significantly

less than white workers. Owens-Illinois asserted that appellants' studies were methodologically unsound. In addition, the company claimed that all wage rates were set pursuant to the provisions of collective bargaining agreements.

Under questioning by the court, appellants' counsel admitted that there were no wage discrepancies between whites and blacks or men and women that were not the result of union contracts. Reporter's Transcript, Vol. XXXV, at 4477-78. As is discussed more fully in the text, infra, the trial court incorrectly ruled that any action undertaken pursuant to a collective bargaining agreement was non-discriminatory. The court therefore discredited the wage studies as a natural consequence of its ruling regarding the collective bargaining agreements.

5. Appellants' failure to assert a cause of action against the union does not provide

a defense to the employer. Whether Owens-Illinois has fulfilled its responsibility to protect the Title VII rights of its current and prospective employees is determined in terms of its own actions, not in relation to the actions of others. See Grant v. Bethlehem Steel Corp., 635 F.2d at 1014; Rosen v. Public Service Electric & Gas Co., 477 F.2d 90, 95 (3rd Cir. 1973). Nor do we understand appellants to have conceded that actions taken pursuant to union contracts were non-discriminatory. The appellants merely asserted that they had not sued the unions because the unions were willing voluntarily to change any practices found to violate Title VII. Reporter's Transcript of Pretrial Conference, 16-19 (June 16, 1978).

6. The trial judge did not indicate whether his ultimate conclusion that Owens-Illinois did not discriminate was predicated on appel-

lants' failure to prove a prima facie case by showing that the company's actual hiring was statistically disparate, or whether he found that Owens-Illinois successfully rebutted appellants' prima facie case. In any event, we have concluded that the establishment of a prima facie case can only be determined upon remand when the relevant market is properly established. We have also concluded that upon the present record, appellants' statistical case has not been rebutted.

7. See note 6 supra.

8. In 1973, Owens-Illinois was considered for a government contract by the United States Energy Research and Development Adminstration (ERDA). Prior to awarding the contract, ERDA examined the composition of the Oakland plant to determine whether the company was in compliance with the affirmative action goals of Executive Orders 11246 and 11375. Owens-

Illinios considered the labor pool for all non-managerial and professional jobs to be the labor force for the city of Oakland. ERDA accepted Oakland as the relevant market, but considered the population a more accurate reflection of the percentage of blacks available.

9. The trial court's pretrial order is ambiguous on this point. It states: "The trial will be to a jury, which will consider questions of both liability and remedy. The trial will not be bifurcated. The jury verdict will be advisory as to all matters the jury considers, except the matters of: (a) whether defendant was guilty of such racial discrimination as to make it liable for § 1981 compensatory and punitive damages; (b) the amount if any, of such compensatory and punitive damages." Excerpt of Record at 72.

The reporter's transcript for the session which discussed whether the class claims would

be tried to the jury is similarly unclear, although subsequent references indicate that the district judge felt that he had disallowed all class claims for legal relief. See Reporter's Transcript, 5-8 (Oct. 10, 1978); Vol. XXXV, at 4472-75.

10. Even if the back pay remedy is legal in nature, appellants were nevertheless not entitled to a jury trial, because it is here incidental to equitable claims. Beacon Theater, Inc. v. Westover, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959) and Dairy Queen Inc. v. Wood, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962) preserved the right to jury trial where there was a joinder of both legal and equitable causes of action, not in a situation where a single cause of action must be characterized as either legal or equitable. See Slack v. Havens, 522 F.2d 1091, 1094, n.4 (9th Cir. 1975).

11. But see text & note 8 supra.

12. The Oakland plant has approximately 350 different job classifications. There is no "journeyman" class. This terms [sic] was created by appellants' counsel who combined numerous skilled positions to create this category. Owens-Illinois attacked this category as an arbitrarily contrived, meaningless amalgam. See Reporter's Transcript, Vol. XXXIII, at 4076-81. The absence of female hires in the component categories is not, however, without probative force.

13. See note 2 supra.

14. Owens-Illinois must consider, among other factors, the applicant's job qualifications, disciplinary record, attendance and medical record, length of service (although seniority is not required to be a controlling factor), experience, education, prior training, job performance ratings, interest in the position

and any other factor unique to the vacancy. Naturally, the district court's list is not exclusive. We therefore highlight one factor which the trial judge did not include but which Owens-Illinois should consider in determining which applicant is "best qualified" - the benefit from and desirability of having an integrated and diverse work force. Cf. Regents of University of California v. Bakke, 438 U.S. 265, 311-14, 98 S.Ct. 2733, 2759-60, 57 L.Ed.2d 750 (1978).

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Floyd W. WILLIAMS, Jr., et al.,
Plaintiffs/Cross-Appellees,

Alice Brice,
Plaintiff/Appellant/Cross-Appellee,

Robert Harold and Aunita Jones,
Plaintiff-Intervenors/Appellants/
Cross-Appellees,

and

Charlotte Harris, et al.,
Plaintiff-Intervenors/Cross-Appellees,

v.

OWENS-ILLINOIS, INC.,
Defendant/Appellee/Cross-Appellant.

No. 79-4410

ORDER AMENDING OPINION,
DENYING REHEARING AND REJECTING
SUGGESTION FOR REHEARING EN BANC

Appeal from the United States District Court
for the Northern District of California
Honorable Robert H. Schnacke, Judge, Presiding
Argued and Submitted: April 13, 1981

BEFORE: TANG and CANBY, Circuit Judges, and
WILLIAMS,* District Judge

The opinion filed in this case on

January 11, 1982, slip op. at 129, is modified

as follows:

At slip op. at 138, left column, second paragraph, after the second sentence ending " . . . referred by union hiring halls" and before the sentence beginning "The trial court ruled . . .", insert the following sentences:

> It is true that Title VII does provide certain limited defenses to an employer. See n. 15, infra. The district court's ruling went beyond the scope of those defenses, however. To the extent that the district court made findings of fact based on this ruling, those findings must be redetermined on remand in light of the proper application of law. Pullman-Standard v. Swint, ____ U.S. ____, _____, 50 U.S.L.W. 4425, 4429 (Apr. 27, 1982).

At slip op. at 139, at the end of footnote 6, without paragraphing, add the following sentences:

> For example, in Finding of Fact No. 7, the district court concluded that "no finding can be made that Owens-Illinois discriminated against Black persons in hiring from a comparison of the civilian work force statistics with the Oakland plant statistics." 469 F.Supp. at 72. Because the district court erred in its selection of the relevant labor market, this finding of fact must be redetermined after the relevant labor market is properly selected.

At slip op. at 143, right column, first full paragraph, after the first sentence ending ". . . collective bargaining contract" and

before the sentence beginning "Accordingly we remand. . .", insert the following sentence:

> Any findings of fact of no discrimination that are based on these rulings must be reconsidered on remand.

At slip op. at 147, right column, at the end of the first full paragraph after the word "defense", insert an indication for a new footnote 15. Then in the margin add the following footnote:

> 15. In ruling that an employer's discrimination is not removed from the prohibition of Title VII merely because it is compelled by a collective bargaining agreement, we do not preclude the employer from asserting on remand the defense of action taken pursuant

to a bona fide seniority system or other defenses provided by § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h). See California Brewers Ass'n. v. Bryant, 444 U.S. 598 (1980); International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977); Pullman-Standard v. Swint, _____ U.S. ____, 50 U.S.L.W. 4425 (Apr. 27, 1982).

The full court has been advised of the proposal to amend the opinion, and of the suggestion for en banc rehearing, and no judge has objected to the amendment or requested a vote on the suggestion for rehearing en banc. Fed. R. App. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

FOOTNOTE

*The Honorable David Williams, United States District Judge, for the District of Central California, sitting by designation.

APPENDIX D

Rule 52, Federal Rules of Civil Procedure. Findings by the Court.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is

filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

42 U.S.C. §2000e-5. Enforcement Provisions.

Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or

seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

FILED
OCT 28 1982
ALEXANDER L. STEVAS
CLERK

No. 82-429

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

OWENS-ILLINOIS, INC.,
Petitioner,

vs.

FLOYD WILLIAMS, JR., et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Ninth Circuit

WHITE, MILLER, GERSTEIN & CLARK
GORDON TODD WHITE
COUNSEL OF RECORD
ALLAN CRAWFORD MILLER
ELAINE GERSTEIN
2626 Grove Street
Berkeley, California 94704
(415) 644-7200
Attorneys for Respondents

QUESTIONS PRESENTED BY PETITIONERS

1. May a Court of Appeal set aside findings of fact made by the District Court in an employment discrimination case where those findings (1) were not found to be clearly erroneous under Rule 52(a) of the Federal Rules of Civil Procedure, and (2) were not the result of legal errors made by the District Court?

2. Did the Court of Appeals err in retroactively applying the 300 day limitation period to this employment discrimination class action where the District Court had applied the 180 day limitation period followed in the Ninth Circuit at the time of the District Court's decision?

PARTIES

Respondents do not disagree with the statement of Parties made by Petitioner.

TABLE OF CONTENTS

	Page
Questions presented by petitioners	i
Parties	i
Statement of case	2
Summary of argument	3
Reasons for denying the writ	5
I	
No new or substantial federal question requiring review is presented under *Pullman v. Swint*, and the question is premature since the matter was remanded for further findings	5
A. Certiorari should not be granted because this question as formed fails to present any issue not already answered and is also too general	5
B. The question is premature	6
C. Petitioners did not certify for review the appellate court's decision that the legal findings regarding the appropriate labor market and union agreement were erroneous	7
D. The district court made specific findings regarding the relevant labor pool which the court of appeals properly reversed due to legal error	7
E. The district court's pretrial ruling that collective bargaining agreements "shall be deemed nondiscriminatory" was ruled by the court of appeals to be erroneous as a matter of law and remanded for further findings	8

TABLE OF CONTENTS

Page

II

The petitioner's issue regarding retroactive application of the 300 day limitation period is not legitimately raised by the facts of this case, nor does it raise any new issue of law 9

A. This case does not present any new or substantial issues of law with regard to the criteria for retroactive application of a judicial decision 9

B. The trial court's decision in this question was issued before the decision petitioner cites as purportedly establishing a 180 day limitation "rule" in the ninth circuit 10

C. The ninth circuit never adopted a 180 day limitation period as argued by petitioner 10

Conclusion 12

TABLE OF AUTHORITIES CITED

Cases

	Page
Chevron Oil Company v. Hudson, 404 U.S. 97 (1971)	9
Harris v. Pan American World Airways, 74 FRD 24 (N.D. CA, 1977)	12
International Brotherhood of Teamsters v. U.S., 431 U.S. 324 (1977)	7, 8
Kirk v. Rockwell International, 578 F.2d 814 (9th Cir. 1978)	11, 12
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	7
Occidental Life Insurance Co. v. EEOC, 432 U.S. 355 (1977)	12
Olson v. Rembrandt Printing Co., 511 F.2d 1228 (8th Cir. 1975)	11
Pullman v. Swint, 456 U.S. ....., 102 S.Ct. 1781, 72 L.Ed. 2d 66 (1982)	5, 6, 8, 9
Ramirez v. National Distillers and Chemical Corp., 586 F.2d 1315 (9th Cir. 1978)	11
Rodriguez v. Southern Pacific Transportation Company, 587 F.2d 980 (9th Cir. 1981)	4, 10, 11
Williamson v. Chevron Research Co., 12 FEP 95 (N.D. CA 1976)	12
Wiltshire v. Standard Oil, 447 F.Supp. 756 (N.D. CA, 1978), rev'd and remanded, 652 F.2d 837 (9th Cir. 1981)	12
Wofford v. Safeway Stores, Inc., 78 FRD 460 (1978)	12

Rules

Federal Rules of Civil Procedure:

Rule 52(a) ..... i, 5, 6

Rule 60(b) 10

No. 82-419

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

OWENS-ILLINOIS, INC.,
Petitioner,

VS.

FLOYD WILLIAMS, JR., et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI To the United States Court of Appeals For the Ninth Circuit

Respondents hereby oppose the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit filed by Petitioner Owens-Illinois, Inc.

STATEMENT OF CASE

Respondents accept Petitioner's statement of the case to the extent it contains facts as opposed to legal argument, with the following corrections and additions:

1. The Court of Appeals discussed the pertinence of the relevant labor market and specifically ruled that:

> The low percentage of blacks employed in certain areas of the plant suggests possible discrimination. Whether the studies in evidence establish a prima facie case, however, can be conclusively determined only by correlating these statistics with the corresponding percentage of blacks in the relevant geographic labor market. (Pet. App. B at 19 and 20.)

Furthermore, at trial and on appeal the petitioners urged the adoption of their zip code analysis of the residences of their current employees to prove the appropriate labor pool. Since the District Court used this labor pool in its findings the Court of Appeals reversed and remanded because "the district judge may have premised his conclusion that Owens-Illinois did not engage in discriminatory practices on this improper market determination." (Pet. App. B at 22.)

2. Not only did the reviewing Court determine that the company failed to rebut plaintiffs statistical case, but the Court of Appeals noted "Indeed, Owens-Illinois' own study suggested that the percentage of blacks hired in craft positions was extremely low." (Pet. App. B at 18-19.)

3. The District Court never made any finding as to whether a prima facie case was established and if so whether it was rebutted by defendant. (Pet. App. B at 59-60, ftn 6)

4. The District Court's pretrial order held:

> Any personnel activity, practice, or procedure at defendant's Oakland plant compelled by an agreement between defendant and any union representing employees at the Oakland plant shall be deemed nondiscriminatory. The Court will not issue any order altering or modifying any such personnel activity, practice, or procedure. (Resp. App. at A-1.)

At no time did the District Court alter this order. Neither plaintiffs nor defendants chose to move for permissive joinder of the unions.

5. Both the Court of Appeals and the District Court treated this as a hiring case in the sense that a main issue was the discriminatory placement and assignment of new hires. (See Pet. App. A at 5, Finding 7; Pet. App. B at 17-18; Pet. App. A at 21, Finding 22; Pet. App. B at 32-33)

6. The date on which the District Court made its ruling that the limitations period would be 180 days was June 28, 1978. This ruling was made in the Court's pretrial order, which predated any decision by the Court of Appeals regarding the applicable limitations period.

SUMMARY OF ARGUMENT

The first question presented concerning the application of the clearly erroneous rule has already been answered by this Court in the very general form in which it is asked. Since Petitioners do not specify the factual findings they feel are in question, this Court would be burdened with reviewing all the findings of the District Court and then determining whether the Appellate Court properly applied the rule.

The question is also premature since the case has simply been remanded for further findings upon the District Court's application of the correct law.

The issues discussed concerning the proper labor market and the effect of the union agreements involve legal issues determined adversely to Petitioners below. Petitioners do not certify as a question the correctness of the determinations; nor do they deny they are legal issues that were contested at both the district and appellate court levels. Rather they argue that this Court should review almost the entire case to make sure that these legal issues were actually a part of this case. This is not a proper basis for the grant of certiorari.

Similarly, the question presented concerning the retroactivity of the ruling on the limitation period for this discrimination action does not present any new or substantial issue of law, but would simply require this Court to review the application of established principles of law by the Court of Appeals.

In addition, the retroactivity question fails to even raise an issue in this case since the case relied upon by Petitioner for the purported "prior rule" of the Circuit, *Rodrigues v. Southern Pacific Transportation Company*, 587 F.2d 980 (9th Cir. 1981), was not decided until after the District Court made its ruling on this issue.

Moreover, *Rodrigues* does not stand for the "prior rule" claimed by Petitioner. In fact, it indicates indirectly that the Circuit had not decided that issue yet, which was explicitly confirmed by the Circuit soon thereafter. The rule finally delivered in this Circuit, and the only rule it made, was the one also applied in this case. Thus there is no issue

of a change in a prior rule, and no question of retroactive application is involved.

REASONS FOR DENYING THE WRIT

I

NO NEW OR SUBSTANTIAL FEDERAL QUESTION REQUIRING REVIEW IS PRESENTED UNDER PULLMAN V. SWINT, AND THE QUESTION IS PREMATURE SINCE THE MATTER WAS REMANDED FOR FURTHER FINDINGS

A. Certiorari Should Not Be Granted Because This Question As Formed Fails To Present Any Issue Not Already Answered And Is Also Too General

In *Pullman v. Swint*, 456 U.S. ....., 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982) this Court has already answered the question posed by the petitioner. A finding of fact not the result of legal error and not found to be clearly erroneous under Fed.Rule Civ.Pro. 52(a) cannot be set aside. The petitioner raises no new issue of law for this Court to review.

In addition the question presented is too general. It fails to specify any finding of fact that was not properly treated by the Court of Appeals. Petitioners expect this Court to go through all the District Court findings and the Court of Appeals decision to determine what findings were improperly treated. As such the question is too vague and unclear for review and would pose a great, time-consuming burden on this Court. In *Pullman*, the question arose regarding a precisely framed factual issue (the issue of discriminatory intent); whereas here the procedural question is raised only in a very general way.

If the Court undertook review of such general questions, there would probably be few cases which are reversed by the Courts of Appeal wherein one party could not request review of that case on the same basis. This Court would then simply be acting as a court of last resort in the ordinary appeal process. Besides, in the instant case, the reviewing Court explicitly noted the *Pullman* standards and remanded for further findings under the normal procedure recommended by *Pullman*. (Pet. App. C. at 2)

In their argument Petitioners discuss at some length two issues in which the Court of Appeals found legal error—the question of the relevant labor market, and the question of the effect of the union agreements. Whether Petitioners are attempting to rephrase the issue so as to include legal errors under the Rule 52(a) standard, or are simply trying to obtain a substantive review by this Court of these two decisions, the question as presented clearly raises neither, nor any other issue that is a sufficient ground for the exercise of this Court's discretionary grant of certiorari review.

B. The Question is Premature

This question is not ripe for certiorari review by this Court because it has been remanded to the District Court for a review of its findings under correct legal standards. The ultimate issue of discrimination has not been decided. This issue remains open until the District Court has had the opportunity to review its findings and make new findings in light of the proper legal standards. The appropriate time for this Court to review the treatment of each finding of fact is only when final action has been taken.

C. Petitioners Did Not Certify For Review The Appellate Court's Decision That The Legal Findings Regarding The Appropriate Labor Market And Union Agreement Were Erroneous

Neither issue is related to the first question presented to the Court although subsumed under the argument. Both are mixed questions of law and fact which the petitioners are seeking to have indirectly reviewed. Since these questions have not been certified by the petitioners for review, it is submitted that these are not proper subjects for this Court's review.

D. The District Court Made Specific Findings Regarding The Relevant Labor Pool Which The Court of Appeals Properly Reversed Due To Legal Error

Petitioner asserts that the "trial court's findings of fact do not purport to be based in any respect upon relevant labor market calculations." (Petition at 12). This assertion is false since the District Court made specific findings regarding the appropriate labor pool for the black class in Findings 1 and 7 (Pet. App. A at 2-3, 5-6). This labor pool was one urged by the Petitioner at trial and was derived from a zip code analysis of the residences of then current employees. The petitioners only now seemingly urge the irrelevance of the labor market because the labor market which they have urged was rejected by the Court of Appeals.

Clearly, a determination of the labor market was necessary for comparison with the number of blacks and women hired and employed in various departments of the defendant's plant in order to determine whether statistical disparity in placement established a prima facie case. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Inter-*

national Brotherhood of Teamsters v. U.S., 431 U.S. 324 (1977).

The Petitioners do not deny that the District Court made errors of law in this area nor do they cite any law to question the correctness of the Appellate Court's ruling. They simply assert, "But, as we have shown, the relevant labor market error purportedly made by the District Court did not influence any findings of fact" (Petitioners brief, page 13) and demand that this Court should reverse for "determination of impact of *legal error*" (Emphasis added.)

This Court has held that, "When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings." *Pullman v. Swint, supra*, 102 S.Ct. at 1791. It is not the place of the Court of Appeals to determine the "impact" of the legal error as urged by Petitioners, but to remand for further findings. Most importantly, the Court held in *Pullman* that Rule 52 does not apply to questions of law or mixed questions of law and fact. *Pullman v. Swint, supra*, 102 S.Ct. at 1789-1792.

E. The District Court's Pretrial Ruling That Collective Bargaining Agreements "Shall Be Deemed Non-Discriminatory" Was Ruled By The Court Of Appeals To Be Erroneous As A Matter Of Law And Remanded For Further Findings

Here again the petitioner does not deny the error of the District Court's pretrial ruling that the union agreements shall be deemed non-discriminatory. It also admits that the District Court made findings of non-discrimination regard-

ing these collective bargaining agreements to which the ruling applied. Once again it urges that somehow the Court of Appeals must decide to what degree the legal error influenced the finding of fact. Indeed as a result of the District Court's pretrial ruling, the petitioner relied on these agreements for its defense and the District Court adopted those contentions in its finding. (Pet. App. B. at 18-19.)

As stated above this Court has ruled clearly in *Pullman* that where there is legal error, remand is the only appropriate course since the District Court is the primary fact finder and would be in the best position to know the effect any erroneous legal views had on its fact finding and to make further findings.

II

THE PETITIONER'S ISSUE REGARDING RETROACTIVE APPLICATION OF THE 300 DAY LIMITATION PERIOD IS NOT LEGITIMATELY RAISED BY THE FACTS OF THIS CASE, NOR DOES IT RAISE ANY NEW ISSUE OF LAW

A. This Case Does Not Present Any New Or Substantial Issues Of Law With Regard To The Criteria For Retroactive Application Of A Judicial Decision

This Court in *Chevron Oil Company v. Hudson*, 404 U.S. 97 (1971) laid out three separate criteria to be used to determine on what special occasions judicial decisions will not be given retroactive effect. The Court of Appeals in this case was well aware of the criteria and did not feel they required interference with the normal operation of appellate review in this case. Petitioner now simply questions the application of these settled principles of law to the facts of this case. No new question is raised with regard to the

criteria to be used or any special applications of them. In fact, this retroactivity issue was not even raised in the request for rehearing below. Thus petitioner again is simply looking to this Court as a court of last resort in the normal appeal process, rather than providing any basis for the special exercise of discretion required to grant a petition for certiorari.

B. The Trial Court's Decision In This Question Was Issued Before The Decision Petitioner Cites as Purportedly Establishing a 180 Day Limitation "Rule" In The Ninth Circuit

Petitioner maintains that the trial court's use of the 180 day statute of limitations "followed the clear authority of the Ninth Circuit in *Rodriguez v. Southern Pacific Transportation Company*" 587 F.2d 980 (9th Cir. 1978), (Petition at 17.) This is not possible. The opinion in *Rodriguez* was originally decided November 9, 1978, and was amended on denial of rehearing on December 18, 1978. In contrast, the trial court in the instant case decided to apply the 180 day statute of limitations in its pretrial order dated June 28, 1978. (Resp. App. at A-2). The opinion in *Rodriguez* could not have provided authority for a Pretrial Order which predated it by almost six months.

C. The Ninth Circuit Never Adopted a 180 Day Limitation Period As Argued By Petitioner

An inspection of the decision in *Rodriguez v. Southern Pacific Transportation Company, supra,* relied upon so heavily by Petitioner as creating the 180 day rule, will show that the decision was confined to the issue of denial of a post-judgment motion under Fed. R. Civ. Proc. 60(b) as an

abuse of discretion. The District Court had dismissed the action because of plaintiff's "failure to file his discrimination charge within 180 days." 587 F.2d 980. The Court of Appeals could not review the trial court's decision on this issue because the notice of appeal was not timely.

Petitioner quotes at length from the section of the opinion in *Rodriguez* wherein the Court took note of the Eighth Circuit opinion in *Olson v. Rembrandt Printing Co.*, 511 F.2d 1228, 1231-33 (8th Cir. 1975) which adopted the 180 day rule which the District Court had relied on as the only Circuit Court ruling on this issue at the time. Only on this basis did the Court of Appeals determine that the District Court had not abused its discretion in denying the motion since in a footnote, omitted from the quote in Petitioner's brief, the Court noted that after the district judge's ruling, in *Doski v. Goldseker Co.*, 539 F.2d 1326 (4th Cir. 1976) the Fourth Circuit rejected the position adopted by the Eighth Circuit in *Olson*. *Rodriguez, supra*, 587 F.2d at 981 n. 4.

This footnote makes it clear that the Court in *Rodriguez* recognized the existing split of opinion in other circuits which it did not attempt to resolve in its opinion. This was confirmed in *Ramirez v. National Distillers and Chemical Corp.*, 586 F.2d 1315 (9th Cir. 1978), decided some two weeks after *Rodriguez*. In *Ramirez*, the Court noted that the Ninth Circuit had reserved decision on the length of the statute of limitations, but that the 300 day statute of limitations had growing support. 586 F.2d at 1319 n.5.

Before the District Court's pretrial order in this case, most of the cases in the Ninth Circuit and district courts of California applied the 300 day rule. *Kirk v. Rockwell*

International, 578 F.2d 814 (9th Cir. 1978); *Williamson v. Chevron Research Co.*, 12 FEP 95 (N.D. CA, 1976); *Harris v. Pan American World Airways*, 74 FRD 24 (N.D. CA, 1977). See also *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 369 n.23 (1977) (dictum stating that since California has a state agency, charges may be filed as long as 300 days after the act.) *Wofford v. Safeway Stores, Inc.*, 78 FRD 460, 492 (1978) (noting that the question remains open.)

Only one local District Court opinion supported the trial Court's use of the 180 day limitation period, and it was later overturned on appeal and the 300 day rule applied. *Wiltshire v. Standard Oil*, 447 F.Supp. 756 (N.D. CA, 1978), *rev'd and remanded*, 652 F.2d 837 (9th Cir. 1981).

CONCLUSION

For all the foregoing reasons Respondents urge denial of the petition for writ of certiorari.

Dated: October 5, 1982

Respectfully submitted,

WITHY, MILLER, GERSTLER & CLARK
GEORGE TODD WITHY
COUNSEL OF RECORD
Attorneys for Respondents

Appendix A

In the United States District Court for the Northern District of California

Floyd Williams, et al.,
Plaintiffs,

vs.

Owens-Illinois, Inc.,
Defendant.

[Filed June 28, 1978]

Pretrial Order

Counsel for the 12 named plaintiffs (including both original and intervening plaintiffs) and for defendant attended the June 16, 1978 pretrial conference in this case. This Court now makes the following pretrial order:

1. Any personnel activity, practice, or procedure at defendant's Oakland plant compelled by an agreement between defendant and any union representing employees at the Oakland plant shall be deemed nondiscriminatory. The Court will not issue any order altering or modifying any such personnel activity, practice, or procedure.

2. Summary judgment is hereby granted, in defendant's favor, as to plaintiffs' claims: (a) under Executive Orders 11246, 11375; (b) for punitive and compensatory damages under Title VII of the 1964 Civil Rights Act (hereinafter, "Title VII"); (c) under 42 U.S.C. § 1981 (hereinafter, "§ 1981"), to the extent based on sex discrimination; (d) under § 1981, to the extent the claims allege racial discrimination against blacks and are based on events occurring before June 11, 1972.

3. The first black named plaintiff to file an EEOC charge alleging racial discrimination was Eugene Williams, on September 3, 1971. The first female named plaintiff to file an EEOC charge alleging sex discrimination was Alice Brice, on September 19, 1974. Named plaintiff Charlotte Harris alleges racial discrimination against herself because she is Mexican-American. She filed her EEOC charge on January 11, 1977. Thus, the following Title VII claims are time-barred: (a) claims alleging racial discrimination against blacks and based on events occurring before March 7, 1971; (b) claims alleging sex discrimination against women and based on events occurring before March 23, 1974; (c) Harris' race-discrimination claims, to the extent based on events which occurred before July 15, 1976.

4. In the preceding paragraph, this Court applied to all claims a 180-day statute of limitations for filing an EEOC charge. Plaintiffs contend that the limitations period for filing an EEOC charge is actually 300 days. However, the 300-day period is inapplicable to this case, since there is no evidence that any named plaintiff filed a charge with the California EEOC or any similar state or local agency [see 42 U.S.C. § 2000e-5(e)].

Defendant contends that the limitations period for claims alleging racial discrimination against blacks is only 90 days, which was the limitations period when Eugene Williams filed his EEOC charge. However, there is no indication that the EEOC had completed action on that charge by March 24, 1972, when the statute of limitations for filing an EEOC charge was increased to 180 days. Thus, the 180-day limitations period applies [see *Inda v. UAL*, 565 F.2d 554, 560-561 (9th Cir. 1977)].

5. Since there were no Mexican-American plaintiffs in this case until the June 1, 1977 filing of the amended complaint, plaintiff Harris' § 1981 race-discrimination claims are time-barred, to the extent they are based on events occurring before June 1, 1974.

6. This Court has considered the continuing-violation doctrine and concludes that it is inapplicable to this case.

7. This Court hereby certifies two classes in this case: (a) all blacks who have been employed at defendant's Oakland plant and who have Title VII race-discrimination claims based on events occurring on or after March 7, 1971, and § 1981 race-discrimination claims based on events occurring on or after June 11, 1972; (b) all women who have been employed at defendant's Oakland plant and who have Title VII sex-discrimination claims based on events occurring on or after March 23, 1974.

8. The trial of this case shall commence Monday, July 10, 1978, at 10:00 a.m. The trial will be to a jury, which will consider questions of both liability and remedy. The trial will not be bifurcated. The jury verdict will be advisory as to all matters the jury considers, except the matters of: (a) whether defendant was guilty of such racial discrimination as to make it liable for § 1981 compensatory and punitive damages; (b) the amount, if any, of such compensatory and punitive damages.

Dated: June 28, 1978

/s/ Robert H. Schnacke
United States District Judge